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Supreme Court of the United States

SEPTEMBER TERM 1969

No. 554

JOHN T. CHAMBERS,

Petitioner,

v.

W. M. BEAUCHAMP,
Administrator of the Estate of D. P. Peck, Deceased,
and Carl Andrew Chambers,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

John T. Chambers, your petitioner, prays that a Writ of Certiorai issue to review the Judgment and Opinion of the Supreme Court of the State of New Mexico, entered in the above case on April 30, 1969.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of New Mexico (infra, Appendix B, page B-1) is reported at 454 P. 2d 772. The Order denying rehearing (infra, Appendix D, page D-1) is unreported.

JURISDICTION

The Judgment and Opinion of the Supreme Court of the State of New Mexico was entered on the 30th day of April, 1969 (infra, Appendix B, page B-1). A Motion for Rehearing timely filed (infra, Appendix C, page C-1) was overruled on the 3rd day of June, 1969 (infra, Appendix D, page D-1). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

(1) Did the refusal of the New Mexico trial judge to honor Petitioner's Affidavit of Disqualification and disqualify himself from trying the case (since the Administrator of the Estate in question was, and had been for many years, his own Court Clerk) deprive Petitioner of his right to Due Process of Law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

(2) Where the will in question had been admitted to probate by the Probate Court in the State of Texas in a contested proceeding, to which the only interested parties in the estate in question submitted themselves, was it a violation of the Full Faith and Credit clause of Article IV, Section 1 of the United States Constitution for the District Court of Lea County, New Mexico to conduct an heirship hearing on the application of the New Mexico Administrator (the Clerk of the District Court to which the application was addressed, who was not an heir or beneficiary of the decedent) and make a finding that the decedent died intestate?

(3) Did the action of the Courts of the State of New Mexico pursuant to the petition of the New Mexico Administrator (the District Clerk who had no interest in the Estate) in finding that D. P. Peck, the decedent, died intestate and ordering the estate distributed equally to the three heirs-at-law at a time when the will in favor of Petitioner had been admitted to probate in the State of Texas in a proceeding submitted to by the other two heirs-at-law, operate to deprive Petitioner of his right to Due Process of Law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, even though the action of the Texas Probate Court was still pending on appeal?

(4) Did the finding by the New Mexico Courts that D. P. Peck was a resident of the State of New Mexico at the time of his death, in spite of the fact that Peck had voluntarily resided in the State of Texas for about three years at the time of his death, violate Peck's right to Due Process of Law guaranteed by Fifth Amendment to the United States Constitution?

STATUTES INVOLVED

The statutes involved are set out in Appendix "H" (infra, page H-1), being the Fifth Amendment, Fourteenth Amendment, Section 1 and Article IV, Section 1 of the United States Constitution.

STATEMENT

Petitioner is one of three heirs-at-law of D. P. Peck, deceased, Respondent Carl Andrew Chambers is one of the other heirs-at-law, being the sole heir-at-law of Carl N. Chambers, Jr., deceased (Petitioner's brother). The other nephew, Charles Chambers was a non-appealing party in the New Mexico litigation complained of on this appeal.

W. M. Beauchmap is the Administrator of the D. P. Peck Estate in the State of New Mexico, being administered by the District Court of Lea County, of which Beauchamp was Clerk at all times material hereto and had been clerk for many years.

D. P. Peck was born May 21, 1886 in the State of Kansas. As a young man he taught school in Texas and New Mexico where he homesteaded the property in question which, due to oil production and other fortuitous circumstances, has grown to a sizeable estate.

In 1914 Peck was adjudicated incompetent in the State of Kansas where he was confined in the State Hospital at Larned, Kansas until Petitioner obtained his release in 1963. From then until his death on September 4, 1966, he resided in Dallas, Texas.

In 1939 Beauchamp was appointed Guardian of Peck's Estate by the District Court of Lea County, New Mexico and he had charge and control of the estate in that capacity until he was appointed Administrator on February 13, 1967. On March 13, 1967 he filed a petition to determine heirship, alleging that Peck had died intestate, was a resident of the

State of New Mexico, was incompetent to execute a valid will and seeking to have the Peck Estate distributed in three equal shares to Petitioner (nephew), Charles Chambers (nephew) and Carl Andrew Chambers (son of predeceased nephew, Carl N. Chambers, Jr.).

On May 12, 1964, Peck had executed a will leaving all of his estate to Petitioner. Petitioner filed the will and an application to probate it in the Probate Court No. Two of Dallas County, Texas. Respondent Carl Andrew Chambers entered his appearance and contested such application. Charles Chambers also appeared and contested said will and application.

On March 16, 1967 the will contest was tried. After hearing all of the evidence, the Probate Judge held in Petitioner's favor and ordered the will admitted to probate. The contestants appealed to the District Court, 95th Judicial District, Dallas County, Texas where the will contest is pending and scheduled to be tried to a jury shortly after the filing of this Petition For Writ of Certiorari.

In the New Mexico proceedings, Petitioner first attempted to disqualify the District Judge of Lea County, New Mexico by telegram and letter, which the Judge refused to accept or honor. Thereafter, Petitioner's New Mexico trial attorney filed a proper Affidavit of Disqualification.

The District Court of Lea County, New Mexico ignored this affidavit and proceeded to hear the application of his court clerk (the Administrator herein). After trial, although Petitioner continuously raised the pendency of the will con-

test in the State of Texas, the District Judge of Lea County, New Mexico granted the application of his long-time Clerk and ordered the Peck Estate distributed to the three heirs-at-law in equal portions, ignoring the decedant's last will and testament which had been admitted to probate by the Probate Court No. Two of Dallas County, Texas. The Administrator offered the testimony of a medical doctor who had never seen the decedent and examined him personally. His opinion testimony was based on hypothetical questions. His testimony was offset by the testimony of T. Mack Terrell, owner and operator of Terrell's Rest Home, Dallas, Texas, the duly commissioned Notary Public who administered the oaths to the testator and the attesting witnesses to the last will of the decedent relied upon by Petitioner herein. Terrell was satisfied of Testator's "sound mind" at the time of execution of the will in question. Otherwise, he would never have executed the Notary Public portion of the self-proving affidavit supplement to Peck's will relied upon by Petitioner.

Hence, this appeal.

ARGUMENT

Ordinarily, in the everyday course of litigation, arguments of "plain fairness" and "simple justice" are submitted to Justice of the Peace Courts, without citation of authority. Petitioner is willing to submit this case to this most esteemed highest Court of this land upon these same basic concepts of Justice, based upon the record herein, supplemented by the overabundance of authorities available to justify his

position. The opening keynote is to be aware of plain, simple, unadulterated and obvious "fairness".

The only problems relate to the fact that the Judge of the District Court of Lea County, New Mexico refused to submit to disqualification and that he further refused to acknowledge that the Probate Court Number Two of Dallas County, Texas admitted, and had the authority to admit, to probate the last will and testament of D. P. Peck, decedent herein.

These problems tend to "overlap" as to the Constitutional provisions and amendments relied upon by Petitioner, so for clarification, Petitioner will submit his arguments under two broad classifications, to-wit:

(1.) FAILURE AND REFUSAL TO DISQUALIFY

and

(2.) FAILURE AND REFUSAL TO HONOR AND RECOGNIZE PECK'S LAST WILL AND THE PENDING PROCEEDINGS IN THE STATE OF TEXAS

(1.) FAILURE AND REFUSAL TO DISQUALIFY

Please permit a quote from Petitioner's Brief submitted to the Supreme Court of the State of New Mexico:

> "The record discloses that an affidavit, (Tr. 45), of disqualification was filed against all of the resident Judges of the Fifth Judicial District on April 27th, 1967, prior to the trial of the matter by Judge Nash on July 27th, 1967. We think Judge Nash's failure to abide by this disqualification in a case involving an action brought by his Court Clerk, William M. Beauchamp, amounts to a *Jurisdiction defect* which *may* be raised at any time, even on appeal, *which we now do.*"

The Trial Court's refusal to disqualify is so unjustified that it is difficult for Petitioner to find a starting point. Let's begin with a pointed question: is Petitioner entitled to a trial in the State of New Mexico by a disinterested trial Court? Answer: of course.

Whether Petitioner received such a fair trial is a matter to be considered. He submits that the relationship between the Trial Judge and his own Court Clerk absolutely precluded a fair and impartial trial.

This Court found that the right to "Due Process" includes the right to an impartial Judge in *Tumey v. Ohio*, 273 U.S. 510 (1927). There mayors of cities and towns in Ohio were authorized to hear cases of violations of the state's liquor laws and received a percentage of the fine as a fee. Tumey was fined $100.00 in such a case where the mayor sat as Judge. The mayor's fee was $12.00 from the fine, which he would not otherwise have received. Held: the *obvious* bias of the mayor was sufficient to make the statute unconstitutional as a deprivation of liberty. No matter how strong the evidence against an accused, an impartial Judge is always a Constitutional necessity.

Petitioner submits that he is entitled to the protection of the Fifth Amendment because his obvious adversaries, the Judge and the Clerk, were agents of the State of New Mexico. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) where it was held that even Chinese aliens were entitled to equal protection of the law and that even the city officials who discriminated against the aliens were the legal agents of the State of California.

The general rule is clearly stated in *48 C.J.S. Judges* 72, p. 1039:

> "The underlying principle of rules for disqualification of judges is that no judge should preside in a case in which he is not WHOLLY FREE, disinterested, impartial, and independent."

From Whitaker v. McLean, 118 F. 2d 596:

> "A right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a 'fair trial', and if before a case is over, the judge's bias appears to have become overpowering it disqualifies him."

The existence of a fair and impartial tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

Under the Federal Statute, *28 U.S.C.A. 144*, an affidavit is required setting forth facts showing bias and these facts must show that the bias is PERSONAL, as opposed to JUDICIAL, in nature. *Gallarelli v. United States*, 260 F. 2d 259 (1st Cir., 1958), cert. den., 359 U.S. 938, 79 S. Ct. 654, 3 L. Ed. 2d 638 (1959). Much less is required under New Mexico procedure, where the affidavit need only state that the Judge cannot hear the case with impartiality.

Every actively practicing lawyer in the United States is familiar with "the Courthouse family", a term applied as a group to the judges, district clerks, county clerks, sheriffs, constables, tax collectors and all deputies and sub-deputies. There is a very real and tangible feeling of esprit de corps among this group. Consider for a brief moment the relationship between a District Judge and his District Clerk.

The Clerk is the strong right arm of the Judge, being responsible for the filing and docketing of new cases, the scheduling of cases for trial, the notification of attorneys of trial settings, the keeping of accurate records as to court costs in each case, the issuance of notices, citations, subpoenas, restraining orders, executions and other process as well as the countless other details of an administrative nature. The Judge's duties are entirely different and need not be described, except to say that they put him in constant contact with his Clerk at every step of the way.

Now, take that Clerk out of his official capacity as Clerk and put him in a lawsuit as a party before his District Judge, specifically Judge Nash and his Clerk-Administrator Beauchamp, and consider whether the Judge could be impartial and unbiased in his Clerk-Administrator's dispute with Texan John T. Chambers. Could the Judge be fair, impartial, unbiased and disinterested under such circumstances? Obviously not. As Circuit Judge Kalodner said in *Green v. Murphy*, 259 F. 2d 591 (3rd Cir. 1958):

> "Judges are human beings and not mechanical machines dispensing undistilled justice on a push-button basis. They are not judicial Univacs or mechanized 'brains.' "

This is serious business. As Justice Frank said in *In re J. P. Linahan, Inc.*, 138 F. 2d 650 (2d Cir. 1943):

> "Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness."

Under Federal practice, the trial Court must accept as true the allegations in the affidavit for disqualification for the purpose of determining the legal sufficiency of the affi-

davit. *Berger v. United States*, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921); *Korer v. Hoffman*, 212 F. 2d 211, 45 A.L.R. 2d 930 (7th Cir. 1954).

After being served with notice as to the Clerk-Administrator's "Petition To Determine Heirship", Petitioner herein sent a telegram to Judge Nash which set out the grounds of disqualification in very clear and unambiguous language. (See Appendix K, page K-1) These grounds fit in with the authorities heretofore cited and it must certainly be presumed that Judge Nash had actual knowledge of the details of Petitioner's objections to his sitting as Judge in this case.

What was Judge Nash's reaction? He let his plain old human nature show, bristling with bias, prejudice and interestedness. (See Appendix I, page I-1)

Compare the Opinion of the Supreme Court of The State of New Mexico (infra, Appendix B, page B-1) on the question of disqualification with the items of correspondence on the question of disqualification, (infra, Appendices, "I", "J", "K" and "L") and it is obvious that there was some confusion on the question of disqualification — but that this confusion existed on the part of Petitioner's New Mexico trial counsel, District Judge Nash and the Supreme Court of the State of New Mexico, but not on the part of your Petitioner, who, the record demonstrates, knew from the beginning that there was no way he could receive a fair trial if such trial was to be presided over by the Clerk-Administrator's own District Judge.

Perhaps unawares, the Supreme Court of the State of New Mexico, in attempting to sidestep the issue of disqualification, overlooked its previous holding in *Rivera v. Hutchings*, 284 P. 2d 222 (1955). There such Court held that the timely filing of the Affidavit,

> "* * * ipso facto divested the Judge of all further jurisdiction in the case, and his subsequent proceedings were without jurisdiction and null and void."

The only restriction under New Mexico law is that the affidavit must be filed before the Court has acted judicially upon a material issue. *Howell v. Montoya*, 398 P. 2d 263. Here, Judge Nash had not acted judicially upon a material issue prior to the filing of Petitioner's Affidavit of Disqualification.

Petitioner submits that he has strictly complied with the procedural requirements to obtain the disqualification of Judge Nash; that all proceedings below subsequent to the filing of his Affidavit of Disqualification are void. Alternatively, he submits that he has substantially complied with the disqualification requirements. *State ex re. Jakobe v. Judge William H. Billings*, Sup. Ct. Missouri, 1967, 421 S.W. 2d 16.

In any event, the disqualification of Judge Nash is abundantly demonstrated and apparent and could not be waived, even by consent of the parties. *Pahl v. Whitt*, 304 S.W. 2d 250.

(2.) FAILURE AND REFUSAL TO HONOR AND RECOGNIZE PECK'S LAST WILL AND THE PENDING PROCEEDINGS IN THE STATE OF TEXAS

Argument hereunder can conveniently be divided into four sections:

(a) Administrator's Lack Of Capacity To Attack Peck's Will, Not Being An Interested Party

(b) The New Mexico Proceedings Were A Collateral Attack On The Texas Proceedings

(c) Peck's Mental Capacity

(d) Peck's Domicile

(a) ADMINISTRATOR'S LACK OF CAPACITY TO ATTACK PECK'S WILL, NOT BEING AN INTERESTED PARTY

The Clerk-Administrator was not an heir-at-law of Peck and he was not a beneficiary under the will. Being aware of the pending will contest in Texas he should be content to serve in the capacity of conservator or protector and manager of this estate until such time as the validity of the will in question has been properly determined. He has no legitimate motive to take sides between the contesting heirs-at-law. Simple fairness would dictate that he take a position of complete impartiality as to the heirs.

Here the Clerk-Administrator has gone above and beyond the call of his duties. He has assumed the active role of a contestant of Peck's last will. As previously stated, he is an agent of the State of New Mexico and certainly it cannot

be argued that New Mexico has any legitimate business engaging in the contest of a will to which it is not a party, directly or indirectly.

As Administrator, Beauchamp has no justiciable interest in the probate of Peck's will. *Aaronson, Administratrix v. Silver*, 304 S.W. 2d 218 (Tex. Civ. App., 1957), where it was said:

> "(4, 5) If a temporary administratrix has any interest in the probate of decedent's will it would seem to be adverse to such probate since the temporary administration terminates with the probate of the will. Sec. 132(a) supra. Our opinion is, however, that a temporary administratrix, as such, has no juticiable interest in either admitting or denying probate to a will. Neither the probate nor the denial of probate of the will could in any legal sense affect her. She could not possibly be aggrieved by the decision of the Court in the will case. It is true that her administration might end with the probate of the will but this is in accordance with the statutes under which she was appointed. She is a creature of the statute with only such rights and duties as emanate therefrom. These do not include seeking or objecting to the probate of her decedent's will."

The above opinion is sound and reasonable and on permissible use of our courts, quotes from the Texas Supreme Court in *Moore v. Stark*, 118 Tex. 565, 17 S.W. 2d 1037:

> "It is contrary to the policy of the state to permit the machinery of its courts to be set in motion at the instance of one who can in no event by profited thereby. Courts do not sit to decide mere abstract questions of law, but to redress grievances and prevent wrongs.

> Whatever the jurisdiction of a court, that court has no power to exercise such jurisdiction until its power is invoked by one having an interest in the subject matter * * * This means more than a mere popular interest. It means a legal interest in the subject matter, one cognizable by the courts."

It is undisputed who the heirs-at-law are. An heirship determination could be made in two minutes. This bitterly contested litigation didn't involve a determination of heirship, it involved a back-handed collateral attack on the order of the Texas Court admitting the Will to probate and a contest by the Clerk-Administrator of Peck's Will in a grotesque effort to establish that Peck had died "intestate".

(b) THE NEW MEXICO PROCEEDINGS WERE A COLLATERAL ATTACK ON THE TEXAS PROBATE PROCEEDINGS

The purported "Decree Determining Heirship" was entered August 16, 1967. (infra, Appendix "A", page A-1). In the New Mexico trial, the Judge excluded Peck's Will from evidence but had to admit the "Order Probating Will" because the Administrator got carried away with his over-zealous attack on the Texas proceedings and "opened the door" by offering evidence as to the appeal of said order. (Tr., page 202.)

Petitioner submits that the full faith and credit clause of the United States Constitution required the New Mexico courts to accord the Texas Judgment the same force and effect that it would have in the courts of Texas. *Booth v. Baker Industries, Inc.*, (D.C., Dela., 1966), 262 F. Supp. 168.

The rule in Texas is that upon collateral attack the validity of a judgment cannot be determined except by the record and unless the record negatives the existence of facts essential to the court's jurisdiction, the law conclusively presumes upon collateral attack that those facts were established by the evidence in the case. *Security Trust Co. of Austin v. Lipscomb County,* (Tex. Sup. Ct., 1944), 180 S.W. 2d 151; *Carroll v. McLeod,* 130 S.W. 2d 277, (Tex. Sup. Ct., 1939).

The Clerk-Administrator took the position in the New Mexico proceedings that since the Texas "Order Probating Will" had been appealed to the District Court of Dallas County, Texas, 95th Judicial District, for a trial de novo that the order was meaningless and should be ignored.

That isn't the law in Texas. See *Texas Department of Public Safety v. Morris et al.,* (Tex. Civ. App., 1968), 426 S.W. 2d 290, where the Court held:

> "So long as the appeals from the suspension orders filed in that court are pending and undetermined, no other court will interfere with its action or adjudicate the question of its jurisdiction in those cases. The temporary stays issued by the Shelby County Court are not void by reason of facts in the record of the particular cases in which the orders were issued and are not subject to collateral attack."

The Texas Statute, *Article 6687b, Sec. 22 Vernon's Ann. Tex. Stats.* authorizes the Texas Department of Public Safety to obtain a suspension of a driver's license by citing him before a police court or a justice of the peace. If an order of suspension is entered, the driver has 30 days to "appeal to the county court of the county wherein the hearing was

held, said appeal to be tried de novo." Exactly parallel to the Peck Will Contest which is pending on appeal to the District Court awaiting a trial de novo.

In reaching the conclusion in the *Morris* case (supra), the Court relied upon *Cunningham v. City of Corpus Christi*, 260 S.W. 266 (Tex. Civ. App., 1924) and *Walker v. Howard*, 30 S.W. 1091, both of which quoted the Supreme Court of Ohio, in *Ex parte Bushnell*, 8 Ohio St. 599:

> "The district court now has possession of the case and the parties to it, and has the legal power and capacity to hear and determine for itself the question of its own jurisdiction and right to act in the premises. The legal presumption in such cases always is that a court thus assuming to act will determine the question of its own jurisdiction correctly, until it has finally acted upon it. Hence it is a rule founded upon the comity which does, and, for the prevention of unpleasant collision, should always, subsist between judicial tribunals, that where court of general jurisdiction, and legally competent to determine its own jurisdiction, has acquired prior jurisdiction, de facto, over person or subject-matter, no other court will interfere with or seek to arrest its action while the case is still pending and undetermined. This rule is sustained and supported by all the analogies of the law. * * * It is right in principle and preventive of unpleasant collision between different tribunals."

The principal of res judicata would also apply in support of the Texas Judgment.

> "* * * a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different course of action, the right, question or fact once so

> determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *United States v. Munsingwear*, 340 U.S. 36, 71 S. Ct. 104, 95 L. Ed. 36 (1950); *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 18 S. Ct. 18, 42 L. Ed. 355 (1897); *United States v. American Honda Motor Company*, (U.S. D.C., Ohio, 1968), 289 F. Supp. 277.

Once the Texas Courts acquired jurisdiction of the Will Contest to determine the validity of the Peck Will they would not lose their jurisdiction by reason of an erroneous decision with respect to the facts, or the law, or both. *21 C. J. S. Courts*, Section 27, page 38; *Coyne v. Layton, et al.*, (S. Ct., Missouri, 1966), 409 S.W. 2d 92.

Res judicata would apply even though a final judgment has not yet been handed down by the Texas Courts. See *Premier Electrical Construction Company v. Miller-Davis Co.*, 292 F. Supp. 213 (1968), where the Court said:

> "* * * Such a final judgment has not yet been handed down. However, concurrent duplicate litigation is no less undesirable than successive duplicate litigation. In either situation, a second suit violates principles of comity between judges, creates administrative inefficiences in the federal courts, and imposes an unfair burden on the defendant." Citing *Eastern States Petroleum & Chemical Corp. v. Walker*, 177 F. Supp. 328.

As shown by the Texas "Order Probating Will", the contestants presented a Motion To Dismiss For Lack Of Jurisdiction during the trial of the Will Contest, which the Probate Court fully heard and duly overruled. Remember that the only interested parties, the heirs-at-law, had all sub-

mitted themselves to the Texas Probate Court. They presented their evidence on the merits of the case as well as on the question of jurisdiction. The Court determined that it did have jurisdiction and that the Will should be admitted to probate. In *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, this Court said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

From *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104:

> "We see no reason why a court in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. * * * Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

Durfee et ux. v. Duke, 375 U.S. 149, 84 S. Ct. 242 (1963) is a landmark case in that it applies the foregoing principles to real property.

Before leaving the discussion of collateral attack and res judicata, Petitioner must mention two other recent decisions. First, *Palma et al. v. Powers et al.*, (U.S. D.C., Ill, 1969), 295 F. Supp. 924:

> "(24-26) It is a well established principle of law that a judgment is subject to collateral attack only on jurisdictional grounds. This is true of both civil and criminal judgments. A judgment entered by a court with jurisdiction of the subject matter and the parties is considered valid, even though erroneous or obtained by fraud. *Until set aside in the court which rendered it or by a reviewing court exercising appellate jurisdiction*, it is binding on the parties and their privies in all of the nation's tribunals, federal or state." Citing *1B Moore, Federal Practice*, Sec. 0.405 (4-1), (2d ed. 1965). (Emphasis added.)

Lastly, *Estate of Georg, Deceased (Callwood, Contestant v. Congregation Religiosa etc.)*, (D.C., Virgin Islands, 1969), 298 F. Supp 741. There it was held that probation proceedings with respect to decedent's personal property in the Virgin Islands must be stayed until the courts of the Dominican Republic render a final decision designating the proper distributees of the property. The Virgin Islands statute provided that as to personal property, the disposition is governed by the laws of the State or country of which decedent was a resident at the time of his death, if he died intestate. Decedent left a will which was being contested in the courts of the Dominican Republic. So even a pending will contest in

a FOREIGN COUNTRY must be waited upon before a distribution is made in a state or territory. Even if New Mexico looks upon Texas as a foreign country, it should still wait for a final determination of the validity of Peck's Will by the Courts of the State of Texas.

(c) PECK'S MENTAL CAPACITY

Peck had not been in New Mexico since 1912 when he left and returned to Texas where he had previously taught school. In 1914 he was declared incompetent in the State of Kansas, where he was committed until 1963 when he was released. He went to Dallas, Texas, where he resided for about three years until the time of his death.

In the New Mexico trial, the Clerk-Administrator produced a doctor who had never examined Peck and who testified on the basis of hypothetical questions only. Federal Courts hold such testimony to be of little or no probative value. *Perales v. Secretary Of Health, Education And Welfare,* (U.S. D.C., Tex., W.D., 1968), 288 F. Supp. 313; *Hayes v. Gardner,* 376 F. 2d 517 (4th Cir. 1967).

In the *Hayes* Case (supra), it was said:

> "(4) Certainly, therefore, in a situation where, as here, unsworn medical reports of examining physicials are received as original evidence on the critical issue of plaintiff's physical condition, a non-examining medical expert is then allowed to 'interpret' those EX PARTE reports, and that 'interpretation' forms the basis for the decision by the hearing examiner, we have what amounts to pyramiding heresay upon hearsay, which, under the circumstances of this case, violates the fundamental rule of fair play and cannot be permitted to stand."

It is undisputed that Peck was released and discharged from the State Hospital, Larned, Kansas and that from there, he came to Dallas, Texas. As previously argued, when the New Mexico Court took Judicial Notice of the appeal of the "Order Probating Will", it took notice of all of the pertinent laws of the State Of Texas.

One such Law reads as follows:

> "Art. 5547 — 81. Effect of discharge
>
> (a) The discharge of a patient terminates the period of commitment: and a discharged patient shall not be again hospitalized other than in accordance with the provisions of this Code.
>
> (b) The discharge of a patient who has been found to be mentally incompetent terminates the presumption that he is mentally incompetent."

This question of incompetence or insanity is a real red herring. It's like calling a person a "communist" or a "homosexual". It's a smear that raises prejudices and false presumptions that roadblock a person's right to "due process of law". As a particularly shocking and thought-provoking example of just how far these presumptions can go, read: *Egan v. United States*, (Ct. Cl. 1958), 158 F. Supp. 377. Notice that in all of the recorded proceedings in the State of New Mexico, poor Peck was constantly subjected to the unfair presumptions of the "smears" and "labels" of incompetence. And Peck left the State of New Mexico in 1912. How could New Mexico know anything about Peck since that time? The Texas Notary Public, T. Mack Terrell, who supervised

the execution of Peck's Will, testified that Peck was mentally alert at the time of execution of said will.

Peck's predicament of sitting in the State Hospital at Larned, Kansas from 1914 until 1963 with the infrequent medical contact shown in the record brings him foursquare within the guidelines set forth by Circuit Judge Burger, (now Chief Justice of This Honorable Court) in *Watson v. Cameron*, 312 F. 2d 878 (D.C. Cir. 1962), to-wit:

> "Where * * * a person is confined for more than one year without such an examination he is entitled, as a matter of right, to an independent examination to test the findings and conclusions of the hospital staff where he is confined."

Obviously, from the record, Peck was not accorded this right!

Of singular importance is the fact that the Probate Court No. 2 of Dallas County, Texas, a court of competent jurisdiction as to the validity of Peck's will and as to the persons interested in Peck's Estate (all Texans who had voluntarily submitted themselves to said Court's jurisdiction), after hearing all of the evidence submitted found and ordered that Peck had testamentary capacity, was a resident of Dallas County, Texas and that his last Will should be admitted to probate.

The Will was properly executed and must be presumed valid. This appears from the face of the Will, the Order probating it and the testimony of the witness T. Mack Ter-

rell. The mere execution of the attestation clause by two witnesses would be "prima facie evidence" of the validity of the will. *In re Maikka's Estate*, 134 P. 2d 723, 110 Colo. 443.

As previously argued, the medical testimony offered by the Clerk-Administrator, offset by the more competent testimony of Petitioner's witness Terrell, was of no probative value: The New Mexico Courts erroneously went on the theory that since Peck had been adjudicated incompetent in 1914, he was presumed to still be under this disability in 1964 when he executed his Will. But that 1914 adjudication is only evidence of incompetence on the date of adjudication. *United States v. Halliday*, 116 F. 2d 812; *Shell v. Sheets*, 152 S.W. 2d 301, 202 Ark. 708.

Remember, Peck voluntarily left New Mexico in 1912, BEFORE ADJUDICATION, and NEVER RETURNED!

(d) PECK'S DOMICILE

Although Peck had not been in New Mexico since 1912, Judge Nash held that he was a legal resident of Lea County, New Mexico at the time of his death. (Appendix "A", page A-1).

The Administrator himself introduced Peck's Death Certificate (infra, Appendix N, page N-1) and it was admitted for "all purposes" (Tr., page 105). Note that the Certificate states in the upper right hand corner that the decedent had his "usual residence (where deceased lived)" in Dallas, Dallas County, Texas for a period of three years. Thus, Administrator's own evidence proves Peck a resident of Texas. The

Death Certificate, the Will and Order Probating Will certainly fall in the category of "unanswerable evidence". *Moore v. Hopkins*, 23 P. 318, 83 Cal. 270. The Certificate is "prima facie evidence" of the facts therein stated. *Troutman v. Mutual Life Ins. Co. of New York*, 125 F. 2d 769; *Krug v. Mutual Ben. Health & Accident Ass'n.*, 120 F. 2d 296.

Peck's mere residence in Dallas, Texas at the time of his death is "prima facie evidence" of domicile there. *Kastel v. Commissioner of Internal Revenue*, 136 F. 2d 530; *New York Trust Co. v. Riley*, 16 A. 2d 772.

For an interesting parallel situation see *In Re Robitaille*, 138 N.Y.S. 391. Robitaille was an English subject in Canada. He moved to New York where he went into business and became naturalized. Later he closed his business and declared his intention to return to the place of his birth. Then he became non compos. A committee was appointed in New York which took him back to the place of his birth where he resided until the time of his death. Held: a sufficient "domicile" was re-established in his home country to confer probate jurisdiction in the first instance on the courts of that country. That is exactly what the New Mexico Courts should have held here: that Peck had re-established his domicile in Dallas, Texas.

On the question of New Mexico's judicial attempts to restrict and deny the right of Peck to move to Texas, to reside there and to establish domicile there, Petitioner sub-

mits that this Court's recent holding in *Shapiro v. Thompson* (April, 1969), 89 S. Ct. 1322 is controlling.

There, Appellee Barley had been a former resident of the District of Columbia and had returned to the District in March, 1941, and was committed a month later to a hospital as mentally ill. She has remained in that hospital ever since. She was deemed eligible for release in 1965 and a plan was made to transfer her to a foster home if welfare assistance could be obtained. Welfare assistance was denied because her time spent in the hospital did not count in determining compliance with the one year requirement. This Court rejected this position holding, in effect, that the one-year requirement was unconstitutional as violative of the Due Process Clause of the Fifth Amendment.

The "Residence Requirements" of the "D. C. Handbook of Public Assistance Policies and Procedures (1966)" provide that a person may not gain residence in the District while:

> "a. A mental patient on parole or furlogh from an institution in another State, regardless of the length of time he may have been absent from that State, unless his guardian has changed his residence to D. C.;"

They further provide that residence is neither gained nor lost while:

> "a. A patient or inmate of any public institution such as a hospital, sanitarium, asylum, jail or penitentiary, or whose care is paid from Government funds in a private institution."

The effect of the decision as to Appellee Barley is that although indigent, destitute, mentally ill and committed as such, she established residence in the District.

Surely Peck, who has been released from the hospital three years before his death, who was not indigent or destitute, who owned a sizeable estate and who possessed testamentary capacity, could establish residence in the State of Texas. All of the freedom-of-travel decisions of this Court discussed by the majority opinon in the *Shapiro Case* would protect Peck in this matter.

CONCLUSION

New Mexico has no legitimate reason for participating in the contest of the Peck Will. The only parties having an interest in Peck's Estate (his three heirs-at-law) had already submitted the matter of the validity of Peck's Will to the Texas Courts.

The State of New Mexico acting through its agents, Judge Nash, the Clerk-Administrator Beauchamp and its Supreme Court has clearly violated Petitioner's Constitutional rights in the particulars set forth herein. The whole proceeding in New Mexico is an obvious subterfuge in which Beauchamp, who should have remained neutral in his fiduciary capacity, chose to be antagonistic toward Petitioner's rights and actively attack Peck's Will. Beauchamp would have no standing in the Texas Courts to even discuss Peck's

Will, much less attack it. He should have had no more standing in the New Mexico Courts.

In any event, Beauchamp's own District Judge should have disqualified himself so that an unbiased Judge could preside and properly determine the litigation.

Respectfully submitted,

WILLIAM C. ODENEAL, JR.,
511 Adolphus Tower,
Dallas, Texas 75202,
and
J. REDWINE PATTERSON,
Praetorian Building,
Dallas, Texas 75201.

By _____

J. Redwine Patterson

Of Counsel:
ODENEAL & ODENEAL

CERTIFICATE

The undersigned hereby certifies that copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico have this day been served upon counsel for Respondents by depositing same in the United States mail, with sufficient postage affixed, addressed as follows:

Mr. Merrill L. Norton
Attorney at Law
Lovington, New Mexico

Messre. Heidel, Swarthout and Samberson
Attorneys at Law
Lovington, New Mexico

Dallas, Texas this ___ day of August, 1969.

J. Redwine Patterson

APPENDIX "A"

IN THE DISTRICT COURT OF LEA COUNTY, STATE OF NEW MEXICO

No. 26,160

IN THE MATTER OF THE ESTATE
OF
D. P. PECK, a/k/a DAVID P. PECK,
DECEASED.

DECREE DETERMINING HEIRSHIP

THIS MATTER having come on this day for hearing upon the Petition for Determination of Heirship filed herein by the administrator, W. M. Beauchamp, and the administrator appearing by his attorneys and the heirs-at-law appearing through their attorneys and all matters in issue having been heard and fully litigated the court finds:

1.

That D. P. Peck, a/k/a David P. Peck, died intestate on on September 4, 1966 and was at the time of his death a legal resident of Lea County, New Mexico, where he resided at the time he became incurably insane; that the decedent's entire estate, consisting of both real and personal property was and is located in Lea County, New Mexico, and there was and is no property of the decedent in any other state; that, therefore, this Court has exclusive jurisdiction over the subject matter of the estate of D. P. Peck and all matters pertaining thereto; that the courts of Texas have no jurisdiction over this estate; and that the proceedings for probate of a purported will of the said decedent in the courts of Dallas County, Texas, are void, not entitled to full faith and credit, and that these proceedings should not be stayed pending the outcome of the Texas proceedings.

2.

That the decedent became insane in or about the year 1912 and never thereafter, until his death on September 4, 1966, had sufficient mental capacity to execute a will; that there is no evidence that the decedent executed a last will and testament prior to the time he was legally adjudicated as incompetent, and that, therefore, the decedent died intestate; that said decedent was never married and left as his sole and only heirs-at-law the following named persons, each of whom is over the age of twenty-one years and whose relationship to the deceased and addresses are shown opposite their respective names, to wit:

Carl Andrew Chambers	son of predeceased nephew, Carl N. Chambers, Jr.	7705 Kingman Apt. 15 El Paso, Texas
Charles Chambers	nephew	3738 Drummond Houston, Texas
John T. Chambers	nephew	P. O. Box 9912 Dallas, Texas

3.

That on the death intestate of the said D. P. Peck, a/k/a David P. Peck, his entire estate, whether real, personal or mixed, and wheresoever situated, descended to and vested in the following named persons, absolutely and in fee simple in the undivided share interests hereinafter set forth opposite their respective names, to wit:

		Share Interest
Carl Andrew Chambers	son of predeceased nephew, Carl N. Chambers, Jr.	⅓
Charles Chambers	nephew	⅓
John T. Chambers	nephew	⅓

That the administrator of this estate, W. M. Beauchamp, was duly appointed as such on the 13th day of February, 1967; that he duly qualified as such in said estate and immediately thereafter gave public notice of his appointment for the time and in the manner provided by law; that all of his acts as said administrator since said appointment, including the filing of the Petition for Determination of Heirship and the prosecution thereof, have been necessary, regular and proper.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that D. P. Peck, a/k/a David P. Peck, died intestate on September 4, 1966, being then a legal resident of Lea County, New Mexico, and leaving an estate consisting of real and personal property in said County and State and not elsewhere; that he left surviving as his sole and only heirs-at-law the following named persons, all adults, whose relationship, share in the estate, and addresses are shown opposite their respective names, to wit:

Carl Andrew Chambers	son of predeceased nephew, Carl N. Chambers, Jr.	⅓	7705 Kingman Apt. 15 El Paso, Texas
Charles Chambers	nephew	⅓	3738 Drummond Houston, Texas
John T. Chambers	nephew	⅓	P.O. Box 9912 Dallas, Texas

that, according to the laws of descent and distribution of the State of New Mexico, all of the property of the decedent on his death, whether real, personal or mixed, and wheresoever situated, descended to and vested in the above named heirs-at-law in the shares set forth opposite their respective names absolutely and in fee simple, subject to the debts, claims and expenses of administration.

IT IS FURTHER ORDERED AND DECREED that the Court retain jurisdiction of this cause for all other purposes of administration.

DONE at Lovington, Lea County, New Mexico this 16th day of August 1967.

/s/ KERMIT E. NASH

District Judge

APPENDIX "B"

Filed: April 30, 1969

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 8622

IN THE MATTER OF THE ESTATE OF D. P. PECK, a/k/a DAVID P. PECK, Deceased; W. M. BEAUCHAMP, Administrator of the Estate of D. P. Peck, Deceased; and CARL ANDREW CHAMBERS,

Appellees,

v.

JOHN T. CHAMBERS,

Appellant.

Appeal from the District Court of Lea County
Nash, Judge

MERRILL L. NORTON
Lovington, New Mexico
Attorney for appellee
W. M. Beauchamp

HEIDEL, SWARTHOUT & SAMBERSON
Lovington, New Mexico
Attorneys for Appellee
Carl A. Chambers

JACK UNDERWOOD
Albuquerque, New Mexico
Attorney for Appellant

OPINION

TACKETT, Justice.

This action was originally filed on February 13, 1967, in the District Court of Lea County, New Mexico, for the purpose of probating the estate of D. P. Peck a/k/a David P. Peck, deceased, who, according to the petitioner, died intestate a resident of Lea County, New Mexico.

On March 13, 1967, there was filed in the same action by petitioner W. M. Beauchamp a petition for determination of heirship, alleging that appellant John T. Chambers was entitled to a one-third interest in and to the Peck estate. After a lengthly trial, a decree was entered on August 18, 1967, which determined that appellant's interest in the estate was a one-third interest and appellant John T. Chambers appeals.

The pertinent issues to be determined in this case are: (1) Was David P. Peck a legal resident and domiciliary of Dallas, Dallas County, Texas? (2) Did he have the mental capacity to form an intent with respect to a change of residence? (3) At the time of his death, did he die testate or intestate?

A brief resume of the facts involved in this case is necessary for an orderly understanding of the problems facing this court. The decedent David P. Peck made application to homestead certain lands in Lea County, New Mexico, in 1909. He built a home thereon, drilled a water well, made other improvements, and established residence in New Mexico. He maintained that residence until about 1912, when he apparently became insane, leaving the land he had homesteaded in New Mexico, returned to his parents' home in Kingman, Kansas, and was committed to a Kansas hospital for the insane on December 24, 1914. His father was thereupon appointed guardian and filed application for reinstatement of the homestead entry. He was allowed additional time within which to make further showing, subsequently perfecting the homestead claim by proving that David P. Peck was a legal resident of New Mexico and became insane

prior to the time he left the homesteaded land. It was disclosed that the entryman was adjudged by a Kansas court to be of unsound mind on December 24, 1914, and that he was found to be mentally unsound for about two years prior to that time, which fixed the period of incompetency beginning sometime in 1912, or prior thereto. This new application for reinstatement was allowed under Title 43 U.S.C.A. §§ 164, 169 and 172. David P. Peck remained in the Kansas mental institution until July 30, 1963, at which time he was removed from that institution and taken by his nephew, John T. Chambers appellant herein, to Dallas, Texas, and placed in a rest home where he died on September 4, 1966. On May 12, 1964, while a patient at the rest home in Dallas, he executed a purported last will and testament leaving his entire estate to his nephew John T. Chambers, which will excluded Carl Andrew Chambers, son of a predeceased nephew Carl N. Chambers, Jr., and Charles Chambers, a nephew. Guardianship proceedings were had in the District Court of Lea County, New Mexico, in which that court determined that David P. Peck died intestate and that each of the three heirs above mentioned were entitled to one-third of the estate.

Query: Was David P. Peck a resident and domiciliary of Dallas, Dallas County, Texas?

At the time of the commitment to the mental institution in Kansas, David P. Peck was a resident of the State of New Mexico, and such domicile continued as long as he was unable to form an intent to change his domicile. From the time of his committment in 1914 until his death in 1966, he had never been adjudicated competent. A mentally incompetent person is presumed to be incapable of changing his domicile. See Annot. 96 A.L.R. 2d 1236. Another presumption is that where a person is once found to be mentally incompetent, the mental incapacity continues until shown otherwise. *Stanley v. Campbell*, 157 Fla. 891, 27 So. 2d 411 (1946); *Belk v. Colleas*, 207 Ga. 328, 61 S.E. 2d 464 (1950); *Davis v. Davis*, 223 N.C. 36, 25 S.E. 2d 181 (1943); In Re Peters' Estate, 43 Wash. 2d 846, 264 P. 2d 1109 (1953).

Since a change of domicile requires both physical presence in the new locality and an intention to abandon the old domicile and to make a home in the new dwelling place without a present intention to leave it, an adult who is incapable of entertaining an intent or making a choice necessarily lacks the capacity to change his domicile voluntarily and by his own act. Likewise, an adult who has been judicially determined to be a mental incompetent at the time he departed from his previously established domicile for a new residence, is presumed to be incapable of acquiring a domicile of choice, absent an affirmative showing that he in fact had sufficient mentality to choose a new domicile, and his domicile continued to be what it was when he became incompetent. Annot. 96 A.L.R. 2d 1236 at 1243-1244.

In Re Sherrill's Estate, 92 Ariz. 39, 373 P. 2d 353 (1962), it is there stated:

> "The legal residence of an adult competent person once established continues until it is superseded by a new one, Valley Nat'l Bank of Phoenix v. Siebrand, 74 Ariz. 54, 243 P. 2d 771. The domicile of a person who becomes insane remains where it was established at that time, Commonwealth v. Kernochan, 129 Va. 405, 106 S.E. 367, 30 A.L.R. 601; Miller v. Nelson, 160 Fla. 410, 35 So. 2d 288; Hayward v. Hayward, 65 Ind. App. 440, 115 N.E. 966 * * *"

Thus, in *McCampbell v. McCampbell*, 13 F. Supp. 847 (D.C. Ky. 1936), applying Kentucky law, it was held that an incompetent, who left the state of his domicile two years after he had been adjudged insane, took up residence in South Africa where he enlisted in the British military forces, later returned to his state of origin, where an order was subsequently entered appointing a committee for him to inquire into his mental condition, pursuant to the judgment entered thirty-five years previously adjudging him insane, and who apparently still labored under the handicap which resulted in the original adjudication, had to be considered as lacking the capacity to expatriate himself or to acquire a

new domicile during his residence abroad. Compare, *White's Guardian v. Martin*, 2 Alas. 495, (1905).

In *Miller v. Nelson*, 160 Fla. 410, 35 So. 2d 288 (1948), it was held that an 84-year-old man, who was suffering from senility had difficulty in talking and writing and eventually had to rely on another to sign his name for him, had been adjudged an incompetent by a court of a sister state to which he had moved shorty before his death, suffered from such unsoundness of mind as to lack the capacity to choose a new domicile, the court observing that an incompetent's mind may be so weak as a result of extreme age as to make him incapable of forming a settled intent to change his home or his domicile. Compare, In Re Estate of Spengler, 282 Ill. App. 607 (1935); and In Re Estate of McCormick, 260 Ill. App. 36 (1931), rev'd on other grounds, 345 Ill. 461, 178 N.E. 195, 77 A.L.R. 1215.

Similarly, in *Sullivan v. Kenney*, 148 Iowa 361, 126 N.W. 349 (1910), it was there held that probate of a foreign will, which had been made by an aged testator shortly before his death in California, to which state he had been removed by his daughter, was denied on the ground that a California court, which had admitted the will to probate, lacked jurisdiction to do so because the testator was not domiciled there when he died, the court being of the opinion that he lacked the mental capacity at the time he was taken to California, and while he lived there, to change his domicile from Iowa to California, and while he lived there, to change his domicile from Iowa to California. See also, *Couyoumjian v. Anspach*, 360 Mich. 371, 103 N.W. 2d 587 (1960); *Federal Trust Co. v. Allen*, 110 Kan. 484, 204 P. 747 (1922); In Re Collins' Estate, 11 N.J. Misc. 233, 165 A. 285 (1932).

In Re Armijo's Will, 57 N.M. 649, 261 P. 2d 833 (1953), it is stated:

> "The admitted standard of testamentary capacity is (a) an understanding of the nature of the transaction, i.e., making a will; (b) a general comprehension of the nature and extent of one's estate; and (c) a recollection of the natural objects of one's bounty.
>
> "* * *

> "* * * If a person has so lost touch with reality as to be unable to understand the true uses and meaning of property, then we say that such a person lacks one essential quality constituting testamentary capacity * * *"

In this connection, it is to be noted that in the instant case appellant admits in his brief in chief, and the record also reveals, that David P. Peck was not aware of the nature and character of his estate to the fullest extent.

There was a stipulation between counsel in the guardianship proceedings in Texas, under which John T. Chambers was appointed guardian of the estate of decedent, that decedent had no property in the State of Texas. A letter from Dr. E. Clayton Kahler of Dallas, attached as an exhibit in the Texas guardianship proceedings, stated that he had "examined Mr. David P. Peck on August 1, 1963, and found him to be of unsound mind and unable to manage his personal affairs." On September 18, 1963, the Probate Court of Dallas County, Texas, entered an order appointing John T. Chambers guardian of the person and estate of David P. Peck, reciting that Mr. Peck was non compos mentis.

The record further reveals that David P. Peck could not have formed an intent to change his domicile voluntarily due to his mental condition, which was of some 54-years duration and, upon his transfer in 1923 to the Larned State Hospital in Kansas where he was confined for approximately 40 years, the admission diagnosis was "dementia preacox, paranoid type." Dr. D. H. Davis, the psychiatrist in charge of the Kansas institution, testified that Peck's mental illness was incurable and his condition was chronic.

The record also reveals that on August 23, 1929, Dr. John A. Dillon, the then superintendent of the Larned State Hospital in Kansas, stated in regard to D. P. Peck that "in all probabilities he will be confined to this or a similar institution for the rest of his life."

Appellant admits that the probate or county court, Dallas County, Texas, admitted the Peck will to probate and that the same is now on appeal from that court. Under Texas statute, Rule 335, Texas Rules of Civil Procedure, it is provided that an appeal suspends the decision, order, decree or judgment of a probate or county court. Thus, we do not have a final decision of the Texas court.

A disqualification of all three judges in the Fifth Judicial District, New Mexico, was filed on April 27, 1967, but appellant's attorney thereafter requested and obtained from Judge Nash of the Fifth Judicial District a continuance of the trial date. The attorney then filed a subsequent motion for continuance which was granted. The action following the filing of the affidavit of disqualification effectively waived any right claimed by appellant. *State v. Hester*, 70 N.M. 301, 373 P. 2d 541 (1962); *State v. Garcia*, 47 N.M. 319, 142 P. 2d 552, 149 A.L.R. 1394 (1943); and *State v. Chavez*, 45 N.M. 161, 113 P. 2d 179 (1941).

As shown by the record, the findings of the trial court are supported by substantial evidence. Therefore, based on the findings of fact and the record in this case, we are of the opinion that David P. Peck did not have the mental capacity to form a voluntary intent to change his domicile; that he died intestate; and that at the time of his death he was a legal resident of the State of New Mexico.

The decision of the trial court will be affirmed.

IT IS SO ORDERED.

WE CONCUR:

/s/ PAUL TACKETT
Justice

/s/ J. C. COMPTON——J.
/s/ DAVID W. CARMODY——J.

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 8622

IN THE MATTER OF THE ESTATE OF D. P. PECK, a/k/a DAVID P. PECK, Deceased; W. M. BEAUCHAMP, Administrator of the Estate of D. P. Peck, Deceased; and CARL ANDREW CHAMBERS.

Appellees,

v.

JOHN T. CHAMBERS,

Appellant.

APPELLANT'S MOTION FOR REHEARING

JOHN T. CHAMBERS pro se
P. O. Box 9912
Dallas, Texas 75214

C-2

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 8622

IN THE MATTER OF THE ESTATE OF D. P. PECK, a/k/a DAVID P. PECK, Deceased; W. M. BEAUCHAMP, Administrator of the Estate of D. P. Peck, Deceased; and CARL ANDREW CHAMBERS.

Appellees,

v.

JOHN T. CHAMBERS,

Appellant.

APPELLANT'S MOTION FOR REHEARING

To the Honorable Supreme Court of the State of New Mexico:

John T. Chambers, Appellant, files this his Motion for Rehearing concerning the Opinion and Order entered by this Honorable Court on April 30, 1969 upon the following grounds:

I.

FIRST POINT

The Supreme Court erred in holding that Appellant's Attorney's requesting and obtaining a continuance *after* filing Appellant's Disqualification of the Judges in the Fifth Judicial District, New Mexico, on April 27, 1967, constituted a waiver of Appellant's right to such disqualification. (Opinion, Page 6, Lines 9-18.)

II.

SECOND POINT

The Supreme Court erred in not applying Rule 14 to the question of disqualification since Appellant's Trial At-

torney represented to him, in writing, that it was *not* the continuance that resulted in waving disqualification (as held by the Supreme Court, Opinion, Page 6, Lines 9-18) *but* that it was Appellant's telegram of April 13, 1968 to the Trial Judge that resulted in a waiver of disqualification (although the Trial Judge *refused* in writing to Appellant to accept the telegram for *any* purpose). Appellant should be granted a disqualification and thereby restored to the same condition as if no mistake had been made and this is a fundamental error.

III.

THIRD POINT

The Supreme Court erred in allowing the Will in question to be collaterally attacked in New Mexico while it is being litigated by the Texas courts, to which all *interested* parties had previously submitted themselves.

IV.

FOURTH POINT

The Supreme Court erred in allowing the Will in question to be collaterally attacked in New Mexico in a suit to determine heirship since the interested parties had already submitted themselves to the jurisdiction of the Texas Court, and especially since the Will contestants had already raised the question of the jurisdiction of the Dallas County Probate Court, and this is a fundamental and jurisdictional error violating Appellant's right to "due process of law" and "full faith and credit" guaranteed by the Constitution of the United States of America.

V.

FIFTH POINT

The Supreme Court erred in failing to withhold and abate final decision in this appeal until a final decision, order, decree or judgment is rendered by the courts of the State

of Texas concerning the admittance of the Will in question to probate, such failure violating Appellant's right to due process of law and "full faith and credit" guaranteed by the Constitution of the United States of America. (Opinion, Page 6, Lines 3-8.)

VI.

SIXTH POINT

The Supreme Court erred in affirming the Judgment of the Trial Court and thereby ordering a distribution of this estate in three portions to the three heirs at law at a time while the validity of the purported Last Will is still being litigated in the courts of the State of Texas, where all of the interested parties have appeared for the purpose of seeking a judicial determination of the validity of said Will, and this is a fundamental error.

VII.

SEVENTH POINT

The Supreme Court erred in holding that David P. Peck died intestate (Opinion, Page 6, Line 23), since the record discloses that the decedent *did* leave a Will and that said Will was admitted to probate by the Probate Court of Dallas County, Texas following a hearing attended by all of the *interested* parties and that such Order, although on appeal, is presently pending in the courts of the State of Texas so that whether or not the decedent died intestate cannot possibly be determined until such time as the courts of the State of Texas have made a final adjudication.

VIII.

EIGHTH POINT

The Supreme Court erred in holding that D. P. Peck was a legal resident of the State of New Mexico at the time of his death, such holding being contrary to the facts in the record and the law. (Opinion, Page 6, Lines 23-25.)

IX.

NINTH POINT

The Supreme Court erroneously held David P. Peck to be a resident of New Mexico (Opinion, Page 6, Lines 24, 25) and was led into such error deceitfully by Appellee Beauchamp, who purposely omitted Lunacy Record "A", Page 95, Examining Physician's Report from his Exhibit "5" at the trial and such Report would have shown facts making it utterly impossible for Peck to have been a resident of the State of New Mexico.

X.

TENTH POINT

That by reason of the gross misconduct of Appellant's Trial Court Attorney in attaching and exhibiting and publishing privileged written communications to said Attorney (see said Attorney's Motion to Withdraw and exhibits thereto), Appellant's case and fundamental rights were so damaged and prejudiced that Appellant should have a new trial, pursuant to the relief provided in Rule 14.

WHEREFORE, Appellant prays the Supreme Court to grant this Motion and to reverse the judgment and decision of the Trial Court and to:

(1) Abate this cause pending a final judgment of the Texas Courts as to the validity of the Will in question,

(2) Grant disqualification herein as to the Judges in the Fifth Judicial District, New Mexico,

(3) Remand this cause for further proceedings, and

(4) Grant Appellant such other relief and orders as he may be entitled to.

Respectfully submitted,

John T. Chambers, pro se

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared John T. Chambers, who, upon oath stated that he was this date forwarded copies of the foregoing Motion for Rehearing to Mr. Merrill L. Norton, Attorney for Appellee Beauchamp, Lovington, New Mexico, and to Messrs. Heidel, Swathout and Samberson, Attorneys for Appellee Carl A. Chambers, Lovington, New Mexico, by depositing same in the United States Mail, postage prepaid.

John T. Chambers

SWORN TO AND SUBSCRIBED BEFORE ME by the said John T. Chambers this ..... day of May, 1969; to certify which witness my hand and seal of office.

Notary Public in and for
Dallas County, Texas.

APPENDIX "D"

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Tuesday, June 3, 1969

No. 8622

Lea County

IN THE MATTER OF THE ESTATE OF D. P. PECK, a/k/a DAVID P. PECK, Deceased; W. M. BEAUCHAMP, Administrator of the Estate of D. P. Peck, Deceased; and CARL ANDREW CHAMBERS.

Appellees,

v.

JOHN T. CHAMBERS,

Appellant.

This cause coming on for hearing upon Appellant's motion for a rehearing, and the Court having considered said motion and brief of counsel, and being now sufficiently advised in the premises,

IT IS ORDERED that said motion for rehearing be and the same is hereby denied.

ATTEST: A True Copy

/s/ ROSE MARIE ALDERETE

Clerk of the Supreme Court of the State of New Mexico

APPENDIX "E"

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 8622

IN THE MATTER OF THE ESTATE OF D. P. PECK, a/k/a DAVID P. PECK, Deceased; W. M. BEAUCHAMP, Administrator of the Estate of D. P. Peck, Deceased; and CARL ANDREW CHAMBERS.

Appellees,

v.

JOHN T. CHAMBERS,

Appellant.

APPELLANT'S NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John T. Chambers, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment affirming the Judgment of the District Court of Lea County, New Mexico entered in this action on April 30, 1969 and the Judgment denying Appellant's Petition for Rehearing entered herein on June 3, 1969.

This appeal is taken pursuant to 28 U. S. Code, Section 1257(3).

Respectfully submitted,

/s/ JOHN T. CHAMBERS

John T. Chambers, *pro se*
P. O. Box 9912
Dallas, Texas 75214

PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

I, John T. Chambers, Appellant herein, depose and say that on the 12th day of June, A. D. 1969 I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the attorneys of record for the Appellees herein by depositing a copy of same in the United States mail, properly addressed, postage prepaid.

/s/ JOHN T. CHAMBERS
John T. Chambers

SUBSCRIBED AND SWORN TO BEFORE ME at Dallas, Texas this 12th day of June, A. D. 1969.

/s/ PHYLLIS COATS
Notary Public in and for Dallas County, Texas

APPENDIX "F"

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 8622

MANDATE

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Lea, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered 26160 on your Civil Docket, entitled IN THE MATTER OF THE ESTATE OF D. P. PECK, aka DAVID P. PECK, Deceased, by your consideration in that behalf judgment was entered against said John T. Chambers; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by said John T. Chambers, Appellant, by appeal, whereupon such proceedings were had that on April 30, 1969, an opinion was handed down and the judgment of said Supreme Court was entered affirming your judgment aforesaid, and remanding said cause to you;

NOW, THEREFORE, this cause is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and said judgment.

WITNESS, The Honorable M. E. Noble, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 13th day of June, 1969.

ROSE MARIE ALDERETE

Clerk of the Supreme Court of the State of New Mexico

APPENDIX "G"

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 8622

W. M. BEAUCHAMP, Administrator of the Estate of D. P. Peck, Deceased; and CARL ANDREW CHAMBERS.

Appellees,

v.

JOHN T. CHAMBERS,

Appellant.

This matter coming on for consideration by the Court upon motion of Appellant to stay and motion for supersedeas bond, and the Court having considered said motion and being sufficiently advised in the premises, Acting Chief Justice Moise, Mr. Justice Compton, Mr. Justice Tackett and Mr. Justice Watson concurring; Chief Justice Noble being absent and not participating;

IT IS ORDERED that, pursuant to the provisions of Rule 9 of Rules of the Supreme Court, a cash or corporate bond in the amount of $25,000.00 be and the same is hereby fixed.

ATTEST: A True Copy

ROSE MARIE ALDERETE

Clerk of the Supreme Court of the State of New Mexico

APPENDIX "H"

1. 28 U.S.C.A., Section 1257 (3)

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.".

2. Article IV, Section 1, United States Constitution

"Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

3. 28 U.S.C.A., Section 1738

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947"

4. Amendment XIV, Section 1, United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "I"

KERMIT E. NASH

District Judge
Fifth Judicial District
State of New Mexico

Hobbs, New Mexico
P. O. Box 2099

April 22, 1967

Mr. John T. Chambers
4515 Live Oak
Apt. 307
Dallas, Texas

Re: D. P. Peck Estate

Dear Sir:

I am returning herewith all of the written instruments you mailed to my clerk for filing in the D. P. Peck case.

You are advised that the laws and court rules of this state do not permit any person to file any instruments in a case unless that person has made a written appearance in the case as a proper party thereto.

You are further advised that the instruments you offered could not possibly be construed as pleadings subject to filing but could only be offered as evidence in a hearing or as exhibits attached to pleadings.

This is the second attempt that you have made to defeat the orderly presentation of this case without making an appearance in the case. Your actions are extremely improper and any such behavior in the future will be ignored.

Yours very truly,

KERMIT E. NASH
District Judge

KEN:c
Encls
cc: Mr. W. M. Beauchamp
Mr. Barton L. Ingraham

APPENDIX "J"

DAVID L. NORVELL

Lawyer

P. O. Drawer E
Clovis, New Mexico
88101

November 27, 1968

Mr. John Chambers
4515 Live Oak #309
Dallas, Texas 75204

Dear Mr. Chambers:

I received your letter and a portion of the brief by appellee.

Please be advised that my file, as I told you by phone night before last, is in Mr. Underwood's hands. I am therefore unable to examine it to determine what correspondence is in existence.

Let me say, however, that I, at no time, intentionally abandoned any or waived any of your rights. The Affidavit of Disqualification was filed. The Judge made a determination that the Affidavit would not be recognized because of the telegrams and other correspondence and telephone conversations he had had with you, his contention being that you had invoked a ruling from the Court. The law is clear that after any party invokes a ruling from the Court, an Affidavit of Disqualification is not timely filed. Therefore, if any waiver or abandonment exists, it is as the result of your invoking a ruling from the Court, and no waiver or abandonment on my part.

After the Judge refused to recognize the Affidavit of Disqualification, we proceeded with a Motion for continuance.

This was granted, but this did not constitute a waiver or abandonment, a waiver or abandonment having existed prior to my entry in the case.

Sincerely yours,

DAVID L. NORVELL

DLN: js

APPENDIX "K"

IN THE DISTRICT COURT OF LEA COUNTY, STATE OF NEW MEXICO

No. 26,160

IN THE MATTER OF THE ESTATE

OF

D. P. PECK a/k/a DAVID P. PECK, DECEASED.

Western Union night letter filed 6:10 P.M. April 13, 1967, Dallas, Tex. From: John T. Chambers, 4515 Live Oak, Apt. #307, Tel. TA 7-0518, Dallas, Texas 75204.

To: Honorable Kermit E. Nash, Judge, District Court, Lea County, Lovington, New Mexico. Delivery report request by return wire collect.

I request that you disqualify yourself as to case No. 26,160, estate of D. P. Peck, deceased and that another district judge unfamiliar with this case be appointed to hear the entire matter. Also I request that the hearing set May 2, 1967 in this case be postponed pending Texas appeal for the reason that D. P. Peck died testate in Dallas County Texas on September 4, 1966, his Will having been admitted to probate as shown by exemplified copy of Will and order admitting to probate being forwarded to you under separate cover. Beauchamp is your district clerk and has been for many years and because of this close relationship it is impossible for you to be fair and impartial considering that evidence will be produced concerning the gross irregularities in the handling of this estate and the previous guardianship estate all of which you have approved up to this date without question. To mention a few of the illegal acts of Beauchamp he has continuously made real estate loans out of this estate contrary to New Mexico Law, he failed to file federal tax returns for two consecutive years, resulting in heavy penalties to the estate and for 16 consecutive years failed to take legal deductions for depletion of petroleum

reserves. I have notified the bureau of revenue, estate tax division, Santa Fe, New Mexico of my intention of applying for waiver of administration and my intention of using the same inventory and appraisment for determining federal estate tax liability and New Mexico inheritance tax liability. Please advise me return wire collect of your action on this request both as to disqualification and postponement.

/s/ JOHN T. CHAMBERS

John T. Chambers

APPENDIX "L"

STATE BAR OF NEW MEXICO
5 August 1969

No. 8622

Mr. John T. Chambers
4515 Live Oak
Apartment No. 307
Dallas, Texas 75204

Dear Mr. Chambers:

The Ethics, Grievances and Discipline Committee of the State Bar of New Mexico has delegated us to investigate your complaint against David Norvell.

Our investigation discloses that a few days previous to April 14, 1967, you mailed to the clerk of the District Court of Lea County instruments in connection with the D. P. Peck Estate, No. 26,160 on the Lea County docket; and that on April 14 you wired the district judge requesting his disqualification and postponement of the case.

On April 25 Mr. Norvell filed an entry of appearance in your behalf and on April 27 an affidavit of disqualification. District Judge Nash would not honor the affidavit of disqualication because of the instruments you had attempted to file and your telegram requesting disqualification and postponement.

Therefore, we conclude that Mr. Norvell did not waive your right of disqualication, but that you did so by your own activity.

With regard to the disclosure of confidential communication between attorney and client, we feel that the disclosure

to a Court in connection with a motion requesting to be relieved as attorney of record is not a disclosure of confidential information.

Yours very truly,

ROBERT M. ROWLEY,

Rober. M. Rowley

DAN B. BUZZARD.

Dan B. Buzzard

Appendix "M"

[FORM BOARD 28]

EXAMINING PHYSICIANS' REPORT.

STATE OF KANSAS, } ss.
Kingman County,

In the Matter of the Alleged Insanity of A. O. Quer

We, THE UNDERSIGNED, examining physicians, appointed for that purpose, visited and examined A. O. Quer, now at the residence of Kingman City in Kingman township (or city), in said county, and are satisfied that said A. O. Quer is insane and a fit person to be sent to a State Hospital; that the disease is of 2 yrs more duration, dating from the first symptoms of this attack; that the cause is supposed to be Religious Meditation He has committed that he was to do evil first grail; that the disease is Not hereditary; that he is not subject to epilepsy; that he does manifest homicidal or suicidal tendencies.

The answers to the following questions, in so far as the matters are not within our personal knowledge, are given on information and belief:

That the patient is a resident of the State of Kansas - Kingman County, Kingman city (or township), Kingman post-office.

The name and address of the nearest friend or relative E C Quer

APPENDIX "M"

[FORM BOARD 28]

EXAMINING PHYSICIANS' REPORT.

STATE OF KANSAS, } ss.
Kingman County,

In the Matter of the Alleged Insanity of D. O. Peck

WE, THE UNDERSIGNED, examining physicians, appointed for that purpose, visited and examined D O Peck, now at the residence of Kingman City in Ft Hale township (or city), in said county, and are satisfied that said Mr D O Peck is insane and a fit person to be sent to a State Hospital; that the disease is of 2 yrs or more duration, dating from the first symptoms of this attack; that the cause is supposed to be Privately Masturbation He has admitted that he used to do this but quit; that the disease is not hereditary; that he is not subject to epilepsy; that he does manifest homicidal or suicidal tendencies.

The answers to the following questions, in so far as the matters are not within our personal knowledge, are given on information and belief:

That the patient is a resident of the State of Kansas - Kingman County, Kingman city (or township) Kingman post-office.

The name and address of the nearest friend or relative E C Peck

Age 28; sex M; color W White ~~, married~~, single, ~~or widowed~~,

If any children, how many? ans; age of youngest X

How long a resident of 1 1/2 yrs, Kansas, Kingman

of the County of Kingman,

Former residence—State Kansas, County

Post-office

Occupation Farmer; pecuniary circumstances good

Is this the first attack of insanity? yrs If not, when did the others occur?

and what was their duration? X

If so, when and where, and whether discharged recovered, or otherwise? X

Was the present attack general or sudden in its outset? General

Does the disease seem to be increasing, decreasing, or stationary? Increasing

Is the disease variable, and are there rational intervals? yes

What has been the patient's usual condition of bodily health? Fair

in said county, and are satisfied that said Mr DO Cick is insane and a fit person to be sent to a State Hospital; that the disease is of 2 yrs or more duration, dating from the first symptoms of this attack; that the cause is supposed to be Disabled Masturbation He has admitted that he used to do this but quit; that the disease is Not hereditary; that he is not subject to epilepsy; that he does manifest homicidal or suicidal tendencies.

The answers to the following questions, in so far as the matters are not within our personal knowledge, are given on information and belief:

That the patient is a resident of the State of Kansas - Kingman County, Kingman city (or township) Kingman post-office.

The name and address of the nearest friend or relative E C Cick

Age 28; sex M; color & White; ~~married~~, single, ~~or widowed~~.

If any children, how many? Ans; age of youngest X

How long a resident of 1/2 yrs, Kansas, Kingman of the County of Kingman,

Former residence—State Kansas, County

Post-office

Occupation Farmer; pecuniary circumstances good

Is this the first attack of insanity? Yes If not, when did the others occur?

and what was their duration?

If so, when and where, and whether discharged recovered, or otherwise? X

Was the present attack general or sudden in its outset? General

Does the disease seem to be increasing, decreasing, or stationary? Increasing

Is the disease variable, and are there rational intervals? Yes

What has been the patient's usual condition of bodily health? Fair

Is the person cleanly or filthy in dress, person, and habits, and is there a disposition to the destruction of clothing, glass, etc.?

Yes

Have any changes occurred in the condition of the mind or body since the attack, and what is the present bodily health?

No Bodily Health Fair

Certificate of Probate Judge. The above is a true and correct copy of the original instrument which is on file or of record in this court.

Dated this 7 day of May 1969

Gene Shaw Probate Judge.

EXHIBIT "D"

29

On what subject and in what way is the derangement now manifested? Emotional, abuse of father at these times. Insomnia, Restless, Will walk 15 to 30 miles at night (15-18 hrs) d/c of dread-undefined-

Are there any permanent delusions? No

Has the patient shown any disposition to injure others? Yes. during emotional Periods threatens father & Mother

If so, was it from sudden passion or premeditation? Sudden passion

Has suicide been attempted? Yes

Has the patient insane relatives? and if so, state the degree of consanguinity, and whether parental or maternal: No

Did the patient manifest any peculiarity of temper, habits, disposition or pursuits before accession of the disease? No

Any predominant passion, religious impression, etc.? No

Was the patient ever addicted to the intemperate use of intoxicating drinks, opiates, or tobacco, or intemperate habits? No

Has the patient ever been subject to any bodily disease, epilepsy, suppressed eruption, discharge of sores, or ever had any injuries of the head? No

If epileptic, state duration and frequency: X

Has restraint or confinement been employed? No

If so, what kind and how long? X

What is supposed to be the cause of insanity? Probably Masturbation was the Starting point. Claims that he has not done this lately

Has the patient shown any disposition to injure others? Yes. during emotional Period threatens father & Brother

If so, was it from sudden passion or premeditation? Sudden passion

Has suicide been attempted? Yes

Has the patient insane relatives? and if so, state the degree of consanguinity, and whether parental or maternal: No

Did the patient manifest any peculiarity of temper, habits, disposition or pursuits before accession of the disease? No

Any predominant passion, religious impression, etc.? No

Was the patient ever addicted to the intemperate use of intoxicating drinks, opiates, or tobacco, or intemperate habits? No

Has the patient ever been subject to any bodily disease, epilepsy, suppressed eruption, discharge of sores, or ever had any injuries of the head? No

If epileptic, state duration and frequency: X

Has restraint or confinement been employed? No

If so, what kind and how long? X

What is supposed to be the cause of insanity? Probably Masterbation Was the Starting point. Claims that he has not done this lately

What treatment has been pursued for the relief of the patient? None

Mention the peculiarities and sex Nothing except what has been Mentioned

State any matters supposed to have any bearing on the case: Done that Spent four years in Texas teaching School - reported that he acted 'Strange' at times while there - when he started home he wired his parents to expect him the next day but instead of coming home he went to another place - Issued Checks on his Father.

Do friends desire to be notified by telegraph in case of serious sickness or death? yes

Give, as precisely as practicable, reasons, evidence and facts upon which the person is decided to be insane: Queer action, Restless, Sing weeks at night, Actions toward wife & others as threats and abusive language, Etc

STATE OF KANSAS, COUNTY OF Kingman } ss.
City (Town or Village) of Kingman }

We, Dr H F Callahan and Dr Jm McKamey

permanent residents of Kingman County, State of Kansas aforesaid, being severally and duly sworn, do severally certify, and each for Himself certifies, with the exceptions which are herein set forth

I am a graduate of an incorporated medical college, and have been a legally practicing physician for more than three years in said state; I have with care and diligence prosecuted an examination, within five days prior to the date of this certificate, the same brought to us on that date, namely, on the 21st day of December 1914 a resident of Kingman, State of Kansas Kingman County, and as a result of such examination find, and hereby certify to the fact, that said O F Peak is insane, and a proper person for care and treatment in some institution for the insane as an insane person, under the provisions of the statutes. Facts indicating insanity personally observed by me as follows:

(Here state what was said to each examiner separately, unless it was said in the presence of both.)

The patient Included in above Statements,

The patient did

(Here state what the patient did in the presence of each examiner separately, unless it was done in the presence of both.)

Was in a state of

instead of coming home he went to another place - Issued Checks on his farm.

Do friends desire to be notified by telegraph in case of serious sickness or death? Yes

Give, as precisely as practicable, reasons, evidence and facts upon which the person is decided to be insane: Suicidal action, Restless, For weeks at night, Actions toward wife & others as threats and abusive language, Etc

STATE OF KANSAS, COUNTY OF Kingman, ss.

City (Town or Village) of Kingman,

We, Dr H T Callahan and Dr J M McKamey

permanent residents of Kingman County, State of Kansas aforesaid, being severally and duly sworn, do severally certify, and each for himself certifies, with the exceptions which are herein set forth

I am a graduate of an incorporated medical college, and have been a legally practicing physician for more than three years in said state; I have with care and diligence prosecuted an examination, within five days prior to the date of this certificate, the same brought to us on that date, namely, on the 24 day of December 1914 a resident of Kingman, State of Kansas Kingman County, and as a result of such examination find, and hereby certify to the fact, that said A P Peak is insane, and a proper person for care and treatment in some institution for the insane as an insane person, under the provisions of the statutes. Facts indicating insanity personally observed by me as follows:

(Here state what was said to each examiner separately, unless it was said in the presence of both.)

The patient Included in above Statements,

The patient did

(Here state what the patient did in the presence of each examiner separately, unless it was done in the presence of both.)

Nothing exceptional

or dead Living If living, age? 47 Condition of health? Good

Habits of life? Good Temperate? Yes Intemperate? X Consumptive? No

Epileptic? No Insane now, or ever been insane? No If patient's mother is dead, age at death? X

Cause of death? X Habits of life while living—temperate or

intemperate? X Consumptive? X Epileptic? X Ever insane? No

That the answers contained in the above statement are true to the best of our knowledge, information, and belief.

(Signed) J M McKamey M.D.
J.W. Callahan M.D.

Examining physicians severally sworn and subscribed before me this

day of December 1914 Sargent County, State of Kansas.

Earle A. Wallace
Probate Judge.

STATE OF KANSAS, COUNTY OF Sargent } ss.
City (Town or Village) of Enderlin

I, the Probate Judge of the Probate Court of Sargent County, State of Kansas, do, on this 24th day of Dec 1914, hereby approve the foregoing medical certificate of illness of insanity, the contents of the same having been certified to before me, under oath, and it being represented to me that it was intended to commit said A.P. Peck to a State Hospital for care and treatment.

Earle A. Wallace
Probate Judge.

EXAMINING PHYSICIANS' REPORT

IN THE MATTER OF THE INSANITY OF

A.P. Peck

To the Probate Court of Sargent County,

State of Kansas.

Limited ted day of A 191

Mrs A Peck Enderlin Ward
"A" Page No. 15

F-3522

The patient's appearance was Fair!

Other facts indicating insanity, including those communicated to me by others, are as follows:
(State if there has been any change in the patient's mental condition or bodily health, and if so, what.)
Nothing but what has been stated before in this report

(Also answer the following questions.)

Family History: Is patient's father living or dead? living; if living, age? 57; habits of life? Good In the use of intoxicating liquors, temperate or intemperate? Temperate Abstainer? Yes Consumptive? No Epileptic? No Insane now, or ever been insane? No If father is dead, age at death? X Cause of death X Habits while living—temperate or intemperate?

Consumptive? X Epileptic? X Insane? X Is patient's mother living or dead? living If living, age? 47 Condition of health? Good Habits of life? Good Temperate? Yes Intemperate? X Consumptive? no Epileptic? No Insane now, or ever been insane? No If patient's mother is dead, age at death? X Cause of death? X Habits of life while living—temperate or intemperate? X Consumptive? X Epileptic? X Ever insane? No

That the answers contained in the above statement are true, to the best of our knowledge, information, and belief.

(Signed) J M McKamey M.D.
J.W. Callahan M.D.

STATE OF KANSAS
Examining physicians severally sworn and subscribed before me this
day of December 1914 Sedgwick County, State of Kansas.
Frank O. Wallace
Probate Judge.

STATE OF KANSAS, COUNTY OF Sedgwick } ss.
City (Town or Village) of Sedgwick

I, the Probate Judge of the Probate Court of Sedgwick County, State of Kansas, do, on this 24th day of Dec 1914, hereby approve the foregoing medical certificate of illness of insanity, the contents of the same having been certified to before me, under oath, and it being represented to me that it was intended to commit said A. P. Peck to a State Hospital for care and treatment.

Frank O. Wallace
Probate Judge.

IS' REPORT
ANITY OF
County,
191
in any Record

APPENDIX "N"

CERTIFICATE OF DEATH

STATE OF TEXAS — STATE FILE NO.

5433-C

TEXAS DEPARTMENT OF HEALTH — BUREAU OF VITAL STATISTICS

1. PLACE OF DEATH
a. COUNTY: Dallas
b. CITY OR TOWN (If outside city limits, give precinct no.): Dallas
c. LENGTH OF STAY in this place: 3 Years
d. NAME OF HOSPITAL OR INSTITUTION (If not in hospital, give street address): D.O.A. Parkland Hospital
e. IS PLACE OF DEATH INSIDE CITY LIMITS? YES [X] NO [ ]

2. USUAL RESIDENCE (Where deceased lived. If institution: residence before admission)
a. STATE: Texas
b. COUNTY: Dallas
c. CITY OR TOWN (If outside city limits, give precinct no.): Dallas
d. STREET ADDRESS (If rural, give location): 2711 N. Washington
e. IS RESIDENCE INSIDE CITY LIMITS? YES [X] NO [ ]
f. IS RESIDENCE ON A FARM? YES [ ] NO [XX]

3. NAME OF DECEASED (Type or print): (a) First: David (b) Middle: Pearly (c) Last: Peck

4. DATE OF DEATH: Sept. 4, 1966

5. SEX: Male

6. COLOR OR RACE: White

7. Married [ ] Never Married [X] Widowed [ ] Divorced [ ]

8. DATE OF BIRTH: May 21, 1886

9. AGE (In years last birthday): 80

IF UNDER 1 YEAR: Months / Days — IF UNDER 24 HRS.: Hours / Minutes

10a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired): Retired

10b. KIND OF BUSINESS OR INDUSTRY: Farmer

11. BIRTHPLACE (State or foreign country): Kansas

12. CITIZEN OF WHAT COUNTRY? U. S. A.

13. FATHER'S NAME: Enoch Peck

14. MOTHER'S MAIDEN NAME: Ida C. Young

15. WAS DECEASED EVER IN U.S. ARMED FORCES? (Yes, no, or unknown): No (If yes, give war or dates of service):

16. SOCIAL SECURITY NO.: None

17. INFORMANT: John L. Chambers

MEDICAL CERTIFICATION

18. CAUSE OF DEATH [Enter only one cause per line for (a), (b), and (c).]

PART I. DEATH WAS CAUSED BY:

IMMEDIATE CAUSE (a): C.V.A. — Interval between onset and death: Instantaneous

Conditions, if any, which gave rise to above cause (a), stating the underlying cause last.

DUE TO (b): Cerebral Sclerosis — 6 years

DUE TO (c): Arteris Sclerosis — 6 years

PART II. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO THE TERMINAL DISEASE CONDITION GIVEN IN PART I(a)

19. WAS AUTOPSY PERFORMED? YES [ ] NO [X]

20a. ACCIDENT [ ] SUICIDE [ ] HOMICIDE [ ]

20b. DESCRIBE HOW INJURY OCCURRED. (Enter nature of injury in Part I or Part II of Item 18.)

20c. TIME OF INJURY: Hour / a.m. p.m. / Month / Day / Year

20d. INJURY OCCURRED WHILE AT WORK [ ] NOT WHILE AT WORK [ ]

20e. PLACE OF INJURY (e.g., in or about home, farm, factory, street, office building, etc.)

20f. CITY, TOWN, OR LOCATION / COUNTY / STATE

21. I hereby certify that I attended the deceased from April 9, 19 66 to Sept 4, 19 66 and last saw the deceased alive on August 24, 1966, 19 ____. Death occurred at 4:30 P. m. on the date stated above, and to the best of my knowledge, from the causes stated.

22a. SIGNATURE (Degree or title): E Stanley Stanley, MD

22b. ADDRESS: 610 Preston Forest Center Dallas 75230

22c. DATE SIGNED: 9/7/66

23a. BURIAL, CREMATION, REMOVAL (Specify): Removal

23b. DATE: 9-4-1966

23c. NAME OF CEMETERY OR CREMATORY: Memorial Park (Kingman, Kansas)

23d. LOCATION (City, town, or county) (State): Ft. Worth, Texas

24. FUNERAL DIRECTOR'S SIGNATURE: Oneal Inc. Thomas H. Yeager

25a. REGISTRAR'S FILE NO.: 5433

25b. DATE REC'D BY LOCAL REGISTRAR: SEP 12 1966

25c. REGISTRAR'S SIGNATURE: Maurine Lamon

VS-112. REV. 1/58

Dallas, Texas Sept 14, 1966

APPENDIX "O"

No. 66-2092-P2 T

Proponents #3

Last Will and Testament

THE STATE OF TEXAS *
* KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF DALLAS *

THAT I, DAVID P. PECK, of Dallas County, Texas, being of sound mind, memory and understanding, do hereby make and publish this my Last Will and Testament, revoking all former wills by me heretofore made.

IT IS MY WILL and DESIRE that my beloved nephew, John T. Chambers, shall, with the rights and authority below given, have all the estate of every description, real, personal or mixed, which I may own, to be used, occupied, enjoyed, conveyed and expended by him as he shall desire.

IN THE EVENT THAT John T. Chambers should predecease me or that we should die as a result of joint disaster or common cause, it is my will that all of my estate shall go to my two beloved grand-nephews, John T. Chambers, Jr. and James E. Chambers, and to my beloved grand-niece, Suzanne Kay Chambers, share and share alike, or the survivor or survivors of them.

I HEREBY APPOINT my beloved nephew, John T. Chambers, independent executor of my Will and direct that no bond shall be required of him and that no other action shall be had in the Probate Court in relation to the settlement of said estate than the probating and recording of this my Will, and the return of an inventory, appraisement and list of claims. I FURTHER APPOINT the National Bank of Commerce of Dallas, Texas as substitute executor to serve independently and without bond in the event John T. Chambers is unable or does not choose to serve.

I HEREBY PROVIDE that an executed copy of this Will shall be retained in the office of my Attorney for the purpose of probate in the

THAT I, DAVID P. PECK, of Dallas County, Texas, being of sound mind, memory and understanding, do hereby make and publish this my Last Will and Testament, revoking all former wills by me heretofore made.

IT IS MY WILL and DESIRE that my beloved nephew, John T. Chambers, shall, with the rights and authority below given, have all the estate of every description, real, personal or mixed, which I may own, to be used, occupied, enjoyed, conveyed and expended by him as he shall desire.

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I HEREBY APPOINT my beloved nephew, John T. Chambers, independent executor of my Will and direct that no bond shall be required of him and that no other action shall be had in the Probate Court in relation to the settlement of said estate than the probating and recording of this my Will, and the return of an inventory, appraisement and list of claims. I FURTHER APPOINT the National Bank of Commerce of Dallas, Texas as substitute executor to serve independently and without bond in the event John T. Chambers is unable or does not choose to serve.

I HEREBY PROVIDE that an executed copy of this Will shall be retained in the office of my Attorney for the purpose of probate in the event of loss or destruction of the original.

WITNESS MY HAND this 12 day of May, 1964, in the presence of the undersigned witnesses appointed and requested thereunto by me.

David P. Peck
TESTATOR

FILED

SEP 8 1966

TOM E. ELLIS, CLERK
County Court, Dallas County, Texas
By Evelyn Tuggy
Deputy

(page one)

RECORDED

THE ABOVE AND FOREGOING WILL of David P. Peck was here now published, signed and executed by him as his Last Will and Testament and we, at his request and in his presence and in the presence of each other, subscribe our names hereto as witnesses.

Albert B. Morris
WITNESS

Miss. Geneva Childress
WITNESS

- -

THE STATE OF TEXAS *
*
COUNTY OF DALLAS *

BEFORE ME, the undersigned authority, personally appeared David P. Peck and the undersigned witnesses, respectively, known to me to be the Testator and the witnesses whose names are subscribed to this instrument in their respective capacities, and, all of said persons being by me duly sworn, the said David P. Peck, Testator, declared to me and to the said witnesses in my presence that said instrument is his last Will and Testament, and that he had willingly made and executed it as his free act and deed for the purposes therein expresses; and the said witnesses, each upon an oath stated to me, in the presence and hearing of the Testator, that the said Testator had declared to them that this instrument is his Last Will and Testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the Testator and at his request; that he was at that time 19 years of age or over and was of sound mind; and that each of said witnesses was then at least 14 years of age.

David P Peck
TESTATOR

Albert B. Morris
WITNESS

WITNESS

Miss. Geneva McClelland
WITNESS

- -

THE STATE OF TEXAS *
*
COUNTY OF DALLAS *

BEFORE ME, the undersigned authority, personally appeared David P. Peck and the undersigned witnesses, respectively, known to me to be the Testator and the witnesses whose names are subscribed to this instrument in their respective capacities, and, all of said persons being by me duly sworn, the said David P. Peck, Testator, declared to me and to the said witnesses in my presence that said instrument is his last Will and Testament, and that he had willingly made and executed it as his free act and deed for the purposes therein expresses; and the said witnesses, each upon an oath stated to me, in the presence and hearing of the Testator, that the said Testator had declared to them that this instrument is his Last Will and Testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the Testator and at his request; that he was at that time 19 years of age or over and was of sound mind; and that each of said witnesses was then at least 14 years of age.

David P Peck
TESTATOR

Albert B. Morris
WITNESS

Miss Geneva McClelland
WITNESS

SUBSCRIBED and ACKNOWLEDGED before me by David P. Peck, Testator, and SIBSCRIBED and SWORN TO before me by the above witnesses this 12 day of May, 1964.

(Seal)

J. Mack Terrell
NOTARY PUBLIC IN AND FOR DALLAS COUNTY, TEXAS

R2.1062
20 PJ.

NO. 66-2092-P/2

IN THE ESTATE OF	X	IN THE PROBATE COURT NO. 2
DAVID P. PECK,	X	OF
DECEASED	X	DALLAS COUNTY, TEXAS

ORDER PROBATING WILL

ON THIS the 16th day of March, A. D. 1967 came on to be heard the written application of John T. Chambers of Dallas County, Texas for the probate of a certain instrument in writing, dated May 12, 1964 and now produced in Court, being filed herein with said application on the 8th day of September, A. D. 1966, purporting and alleged to be the Last Will of David P. Peck, Deceased, and in the alternative for the probate of a holographic instrument, dated December 2, 1963, and now produced in Court, being filed herein with applicant's Amended Application on the 2nd day of November, A. D. 1966, purporting and alleged to be the Last Will of David P. Peck, Deceased, only in the event that the written instrument dated May 12, 1964 should be denied probate, which said application is also for Letters Testamentary, and came the proponent, John T. Chambers, in person and by his

ORDER PROBATING WILL

ON THIS the 16th day of March, A. D. 1967 came on to be heard the written application of John T. Chambers of Dallas County, Texas for the probate of a certain instrument in writing, dated May 12, 1964 and now produced in Court, being filed herein with said application on the 8th day of September, A. D. 1966, purporting and alleged to be the Last Will of David P. Peck, Deceased, and in the alternative for the probate of a holographic instrument, dated December 2, 1963, and now produced in Court, being filed herein with applicant's Amended Application on the 2nd day of November, A. D. 1966, purporting and alleged to be the Last Will of David P. Peck, Deceased, only in the event that the written instrument dated May 12, 1964 should be denied probate, which said application is also for Letters Testamentary, and came the proponent, John T. Chambers, in person and by his attorneys, and came the Contestant Carl Andrew Chambers by and through his attorney of record and came the Contestant Charles A. Chambers in person and by his attorney of record, and in addition to their contests filed as to the application and amended application herein, said contestants filed and presented their Trial Amendment containing a Plea to the Jurisdiction of this Honorable Court and a Motion to Dismiss, and due proof being taken in the manner required by law, and it appearing to the satisfaction of the Court that this Court has jurisdiction and venue over this Estate, proceeding and subject matter and that every citation and notice required by law has been duly issued, served and returned in the manner and for the length of time required by law and that Contestants' Motion to Dismiss for lack of

RECORDED

jurisdiction should be denied, and it appearing to the Court that said Will is self-proved having been duly executed by the said David P. Peck, the Testator, and duly witnessed by Geneva Childress and Albert B. Morris in the manner required by law and sworn to and subscribed by them before J. Mack Terrell, a duly appointed Notary Public of Dallas County, Texas; and it having been proven to the satisfaction of the Court by the record herein and by the attesting witnesses to said Will taken before said Notary Public that the Testator, David P. Peck at the time of executing said Will dated May 12, 1964 was above nineteen (19) years of age, was of sound mind and died on September 4, 1966 in the City of Dallas, Dallas County, Texas; that he resided and had his domicile in Dallas, Dallas County, Texas; that such Testator executed said Will dated May 12, 1964 with all the formalities and solemnities and under the circumstances required by law to make same a valid Will; that the same has not been revoked by such Testator and that said Will is entitled to probate; that the said David P. Peck was not divorced since the execution of said Will and that no children have been born to him or adopted by him since the execution of said Will; and it further appearing to the Court that the holographic instrument dated December 2, 1963 should not be admitted to probate; and it further appearing that the proponent, John T. Chambers, was named in said Will as Executor, that he is entitled by law to Letters Testamentary, is willing to accept the trust and to qualify according to law and is not disqualified from accepting Letters, that four (4) years have not elapsed since the death of the said David P. Peck, that such Will dated May 12, 1964 provides in effect that no other action

and subscribed [illegible]

Notary Public of Dallas County, Texas; and it having been proven to the satisfaction of the Court by the record herein and by the attesting witnesses to said Will taken before said Notary Public that the Testator, David P. Peck at the time of executing said Will dated May 12, 1964 was above nineteen (19) years of age, was of sound mind and died on September 4, 1966 in the City of Dallas, Dallas County, Texas; that he resided and had his domicile in Dallas, Dallas County, Texas; that such Testator executed said Will dated May 12, 1964 with all the formalities and solemnities and under the circumstances required by law to make same a valid Will; that the same has not been revoked by such Testator and that said Will is entitled to probate; that the said David P. Peck was not divorced since the execution of said Will and that no children have been born to him or adopted by him since the execution of said Will; and it further appearing to the Court that the holographic instrument dated December 2, 1963 should not be admitted to probate; and it further appearing that the proponent, John T. Chambers, was named in said Will as Executor, that he is entitled by law to Letters Testamentary, is willing to accept the trust and to qualify according to law and is not disqualified from accepting Letters, that four (4) years have not elapsed since the death of the said David P. Peck, that such Will dated May 12, 1964 provides in effect that no other action shall be had in the Probate Court in relation to the settlement of such estate than the probating and recording of such Will and Codicil thereto and the return of an Inventory, Appraisement and List of Claims of such Estate, but that Letters Testamentary

should not issue herein pending the appeal announced by Contestants:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Contestants' Plea to the Jurisdiction and Motion to Dismiss for lack of jurisdiction contained in their Trial Amendment filed with leave of Court during the trial of this cause be, and the same is hereby, denied and overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the said Will, dated May 12, 1964, on file herein, be, and the same is hereby, admitted to probate and record as the Last Will of the said David P. Peck, Deceased, and such Will, together with the Application for Probate thereof and all the testimony given in this proceeding shall be recorded in the Minutes of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the holographic instrument dated December 2, 1963 be, and the same is hereby, denied probate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Letters Testamentary not be issued by the Clerk in this cause, pending the outcome of the appeal announced by Contestants.

TO all of which action of the Court, the Contestants Carl Andrew Chambers and Charles A. Chambers in open court duly objected and excepted and gave notice of appeal to the District Court of Dallas County, _____ Judicial District of Texas.

Contestants' Appeal Bond is fixed by the Court at the sum of $200.00.

SIGNED AND ENTERED this 30 day of MARCH.

cause be, and the same is hereby, denied and overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the said Will, dated May 12, 1964, on file herein, be, and the same is hereby, admitted to probate and record as the Last Will of the said David P. Peck, Deceased, and such Will, together with the Application for Probate thereof and all the testimony given in this proceeding shall be recorded in the Minutes of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the holographic instrument dated December 2, 1963 be, and the same is hereby, denied probate.

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SIGNED AND ENTERED this 30 day of MARCH, A. D. 1967.

Judge of the Probate Court
No. 2 of Dallas County, Texas.

APPROVED AS TO FORM:

Attorney for Proponent, John T. Chambers

Attorney for Contestant Carl Andrew Chambers

Attorney for Contestant Charles A. Chambers.

THE STATE OF TEXAS,
COUNTY OF DALLAS } SS.

I, Tom E. Ellis, County Clerk of and Probate Court Dallas County, and Clerk of the County Court within and for the County of Dallas, State of Texas, do hereby certify that the foregoing is a true and correct copy of the Last Will and Testament and Order Probating Will

in

Cause No 66-2092-B/2 the matter of the Estate of David P. Peck, Deceased, as the same appear on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 17th day of April A. D. 1967

Tom E. Ellis

Clerk, County Court/Dallas County, Texas.
and Probate Court

THE STATE OF TEXAS,
COUNTY OF DALLAS } SS.

I, Ted Robertson, Judge of the ~~County~~ Probate Court No 2 of Dallas County, State of Texas, the same being a Court of Record and having a Clerk and Seal, and having jurisdiction over probate matters, do hereby certify that Tom E. Ellis, who has signed the foregoing attestation, is the duly elected and qualified Clerk of said Court and that the signature of said Clerk to said Certificate is genuine, and that said Certificate of attestation is in due form according to the laws of the State of Texas, and entitled to full faith and credit.

TO WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of said Court to be hereunto affixed, this 17th day of April A. D. 19 67.

Ted Robertson

Judge, County Court, Dallas County, Texas.
Probate No. 2

THE STATE OF TEXAS,
COUNTY OF DALLAS } SS.

I, Tom E. Ellis, County Clerk of and Probate Court Dallas County, and Clerk of the County Court of Dallas County, State of Texas, do hereby certify that the Honorable Ted Robertson who has signed the foregoing attestation, is the duly elected and qualified Judge of said Court, and that the signature of said Judge to said Certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed

correct copy of the Last Will and Testament and Order Probating Will

in

Cause No 66-2092-B/2 the matter of the Estate of David P. Peck, Deceased, as the same appear on file and of record in my office.

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Clerk, County Court, Dallas County, Texas.
and Probate Court

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TO WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of said Court to be hereunto affixed, this 17th day of April A. D. 1967.

Judge, County Court, Dallas County, Texas.
Probate No. 2

THE STATE OF TEXAS,
COUNTY OF DALLAS } SS.

I, Tom E. Ellis, County Clerk of Dallas County, and Clerk of the County Court and Probate Court of Dallas County, State of Texas, do hereby certify that the Honorable Ted Robertson who has signed the foregoing attestation, is the duly elected and qualified Judge of said Court, and that the signature of said Judge to said Certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 17th day of April A. D. 1967

Tom E. Ellis

Clerk, County Court, Dallas County, Texas.
and Probate Court

SUPREME COURT, U. S.

FILED

SEP 29 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 554

JOHN T. CHAMBERS,

Petitioner

v.

W. M. BEAUCHAMP, ADMINISTRATOR OF THE ESTATE OF D. P. PECK, DECEASED, AND CARL ANDREW CHAMBERS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF FOR RESPONDENTS IN OPPOSITION

MERRILL L. NORTON
Post Office Drawer 1567
Lovington, New Mexico 88260

A. M. SWARTHOUT
Post Office Box 1298
Lovington, New Mexico 88260

Counsel for Respondents

SCHIFANI BROTHERS PRINTING CO., INC. SANTA FE, N. M.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 554

JOHN T. CHAMBERS,

Petitioner

v.

W. M. BEAUCHAMP, ADMINISTRATOR OF THE ESTATE OF D. P. PECK, DECEASED, AND CARL ANDREW CHAMBERS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of New Mexico (Appendix B, Page B-1 of the Petition) is reported at 454 P.2d 772 and will be included in Volume 80 N. M. when published.

JURISDICTION

There is no jurisdiction to review the decision of the Supreme Court of New Mexico for the reason that the constitutional questions raised by the petitioner for Writ of Certiorari were first presented to the Supreme Court of New Mexico by Motion for Rehearing after the Opinion had been written. The Motion for Rehearing was denied without Opinion, and the Opinion of the Supreme Court was based on the same construction and application of New Mexico law as the Decision of the District Court.

QUESTION PRESENTED

Whether or not the Decision of the Supreme Court of New Mexico violated petitioner's rights under the Constitution of the United States by denying him due process of law under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, or violated the full faith and credit clause of Article IV, Section 1 of the Constitution of the United States.

STATUTES INVOLVED

In addition to the statutes set out in Appendix "H" of the Petition, the following is also deemed pertinent:

Rule 335, Vernon's Texas Rules of Civil Procedure, Volume 3, compiled under Section 12, Review by District Courts of County Court Rulings, Subsection A, Guardianships and Estates of Decedents, reads, in material part:

> "The appeal shall suspend the decision, order, decree, or judgment, or the designated portion thereof appealed from, except as may be otherwise expressly provided by law; * * *."

STATEMENT

It is deemed necessary to supplement the Statement contained in the Petition for Writ of Certiorari to provide certain pertinent facts omitted therefrom.

Petitioner, John T. Chambers, seeks to recover for himself the whole of his deceased uncle's estate and to deprive his own brother and his own nephew from any share therein. Under the applicable laws of descent and distribution, each of said three heirs-at-law would receive an equal one-third (1/3rd) share.

Petitioner's effort is based on a purported Will which was signed by his uncle in Dallas, Texas, in 1964, when D. P. Peck was approximately 77 years old and had been mentally deranged for some 54 years, and after petitioner had his uncle released to his custody in 1963 from the Larned State Hospital for the Insane in the State of Kansas, had placed him in a rest home in Dallas, and had himself appointed as Guardian in Dallas County, Texas, under a Petition alleging that his uncle was still of unsound mind.

The whole of D. P. Peck's estate stems from a single half section of land in Lea County, New Mexico, described as the West Half (W½) of Section 26, Township 12 South, Range 37 East, N.M.P.M., on which Peck made his homestead entry on February 25, 1909, and the whole of said estate was at all times located and administered in the State of New Mexico throughout the lifetime of D. P. Peck. After the original entry in 1909, a Patent was finally issued on this half section on August 21, 1931, to David P. Peck, with a later Patent being subsequently issued on December 21, 1939, in lieu of and to correct the previous Patent, which had erroneously contained a reservation of oil, gas and potash.

The events between 1909 and 1931 are especially significant and appear from the certified and authenticated photostatic copies of all the documents and records of the General Land Office relating to the issuance of these two (2) Patents, which were admitted into evidence in the hearing before the District Court of Lea County, and which documents were certified under the seal of the General Services Administration, National Archives and Record Service, as being on file in the National Archives in Washington, D. C.

After making his homestead entry in 1909, Peck on Au-

gust 14, 1912, submitted his final proof, in which he stated that he first established his residence on April 15, 1909, built a house, dug a well, set up outbuildings, strung wire and cultivated 40-80 acres each year from 1909 to 1912. He also reported occasional absences from the land, which in 1911 and 1912 added up to 5½ months each out of the entire year. In support of his proof, he submitted the Affidavits of two neighbors, who swore to his entry and actual residence on the land for three years. In his Notice of Intention filed on June 18, 1912, Peck stated his residence as being Scott, New Mexico, (now Gladiola, New Mexico), being the post office nearest the said land.

On April 18, 1913, the General Land Office rejected Peck's proof under the Act of June 6, 1912, on the ground that for the years 1911 and 1912 accumulated absences exceeded the maximum five months per year, but advised that new proof might be made when five years residence were shown from April 15, 1909, under the five year law or under the three year law by showing further residence of at least seven months since the submission of the proof in question. No appeal having been made therefrom, patent authorization was cancelled on October 14, 1913. Peck's entry, however, subject to later proof, still remained on file in the Land Office at Las Cruces, New Mexico.

On December 22, 1927, the Land Office in Las Cruces sent Peck notice that, unless he made final proof, his claim would be forfeited and his entry cancelled. No reply having been received from Peck (correspondence was mailed to an old address), the General Land Office in Washington, D. C., cancelled his entry on April 19, 1928.

On July 22, 1929, D. P. Peck's father, E. C. Peck, wrote to the Commissioner of the General Land Office advising that he had paid the taxes on the half section in question for the past sixteen (16) years on behalf of his son, and that he had only recently become aware of the cancellation of his son's entry, and that he wished to have the entry reinstated. His letter further states that his son, some months after receiving a Certificate that proof had been made, had returned to his parents'

home in Kingman, Kansas, in a deranged state of mind. Formal application for reinstatement of the cancelled entries were duly made. Supporting documents and affidavits reveal that Peck was later adjudged insane on December 24, 1914 by the Probate Court of Kingman County, Kansas, and committed to the State Hospital for the Insane at Osawatomie, Kansas, and in 1923 was transferred to Larned State Hospital for the Insane at Larned, Kansas, his mental derangement having existed for two or more years prior to December 24, 1914, when he was adjudged insane. When transferred to the Larned State Hospital, Peck was suffering from Dementia Praecox, paranoid type, a psychosis, and it was at that time concluded that in all probability he would be confined to an institution for the rest of his life.

On May 1, 1930, the acting Commissioner of Lands wrote the Register in Las Cruces reinstating the entry. In part, the acting Commissioner wrote:

> "The entryman is evidently entitled to consideration under the act of June 8, 1880 (21 Stat. 166). The fact of the entryman's insanity was unknown to this office at the time his proof was rejected and at the time his entries were canceled.
>
> "Upon consideration of the case under the five year law, it sufficiently appears that the entryman complied with the law up to the time he became insane. The entries now combined under one serial 040591, are, therefore, reinstated."

The entry was finally confirmed by the General Land Office on July 14, 1931. In 1939, when a corrected Patent was issued, eliminating the oil, gas and potash reservation, the Land Commissioner wrote:

> "Later E. C. Peck, as guardian, filed an application for reinstatement of the entries was allowed additional time within which to make further showing. In this, it was disclosed that the entryman was adjudged to be of unsound mind on December 24, 1914, *that he was found*

to be mentally unsound for about two years prior to that time, which would fix his period of incompetency as beginning in 1912, *and that the insanity continued and was reported as incurable."*

Peck's estate was always located and administered in the State of New Mexico; W. M. Beauchamp was appointed Guardian of his estate in 1939 on the Petition of Peck's mother, and continued in that capacity until after Peck's death and his appointment as Administrator. It is to be noted that W. M. Beauchamp was appointed Guardian of the estate some thirty years before The Honorable Kermit E. Nash ever ascended to the Bench. The District Court of Lea County in its Decision found that "there was and is no property of the decedent in any other state." This finding was amply supported by the evidence and was not attacked in any manner by the petitioner.

In 1963, when Peck was then 77 years old, his nephew, the petitioner, had him released to his custody by the Larned State Hospital. At this time, Peck was not cured of his mental illness, his mental illness was incurable, but there was nothing more that could be done in the way of treatment; and since he was not violent, he could be cared for as well in a rest home. The petitioner took Peck to Dallas and placed him in Terrell's Rest Home. In September of 1963, the petitioner had himself appointed as Peck's Guardian in a Dallas Court, attaching to his Petition a letter from a Texas doctor, which stated that on August 1, 1963, he had examined Peck and found him to be of unsound mind and unable to manage his personal affairs. It was following this, on May 12, 1964, that Peck signed the purported Will leaving his entire estate to the petitioner, or in the event of the prior death of petitioner, then to petitioner's children.

Within ten (10) days following Peck's death on September 4, 1966, W. M. Beauchamp, through counsel, requested petitioner to bring the purported Will to New Mexico, where the estate was located, and to offer it for probate, if petitioner maintained it was a valid Will. This petitioner never chose to do, and some five months later, said W. M. Beauchamp finally

commenced proceedings for administration of the estate in New Mexico.

At the hearing in the District Court of Lea County, the Administrator offered by deposition the testimony of Dr. D. H. Davis, a duly licensed medical doctor of the State of Kansas, and a member of the psychiatric staff of the Larned State Hospital, who had past personal acquaintance with Peck and personal knowledge of his condition at the time he left Larned. In addition, the Administrator offered the testimony of Dr. Warren T. Brown, now of Albuquerque, New Mexico, who listed among his qualifications teaching and serving as Chairman of the Department of Psychiatry and Mental Hygiene at Yale University, neuro-psychiatric consultant to the West Pacific Base Command during World War II, and Professor and Chairman of the Department of Psychiatry and Neurology at Baylor University College of Medicine in the Texas Medical Center in Houston, Texas. Petitioner countered only with T. Mack Terrell, owner and operator of Terrell's Rest Home.

Counsel for petitioner in his Brief-In-Chief filed in the New Mexico Supreme Court admitted with respect to his only witness, J. Mack Terrell, "It is impossible to point out any one portion of Mr. Terrell's testimony which would indicate that David P. Peck was in control of all his faculties in 1964 or that he was knowledgable of the natural objects of his bounty or the nature of his estate * * *."

The hearing before the District Court of Lea County was initially set for May 2, 1967. The Affidavit of Disqualification filed by petitioner stated that none of the three Judges of the Fifth Judicial District could, according to the belief of petitioner, preside over the action with impartiality. These three Judges were The Honorable George L. Reese,, residing at Roswell, Chaves County, New Mexico; The Honorable Caswell S. Neal, residing at Carlsbad, Eddy County, New Mexico, and The Honorable Kermit E. Nash, residing at Hobbs, Lea County, New Mexico. This proposed disqualification was not made on any constitutional grounds, as set forth in the New Mexico Constitution, and was not accompanied by any motion, but rather was merely an attempted statutory disqualification,

which does not set forth any facts on which the alleged impartiality is based.

On May 1, 1967, counsel for petitioner served a Motion for Continuance on counsel for the Administrator, and on May 3, 1967,, secured and filed an Order signed by District Judge Kermit E. Nash continuing the hearing to June 19, 1967. Previous to serving the Motion for Continuance, petitioner's counsel had obtained the consent of the Administrator's counsel to a continuance, and at that time stated he was aware that by obtaining an Order for Continuance he would be waiving the Affidavit of Disqualification previously filed. The Motion for Continuance states as its sole ground the fact that counsel had not had sufficient time to properly prepare for trial.

Following the entry of the District Court's Decision, petitioner in appealing to the New Mexico Supreme Court, only filed a Praecipe for a portion of the record, and in setting forth his points to be relied on in the appeal, made no mention, whatsoever, as to the attempted disqualification, on which he now relies so strongly. Likewise, petitioner's Brief-In-Chief in the New Mexico Supreme Court contains no Point directed to this question, but merely contains a short reference to it at the end of the Brief. No mention is made of the Fifth or Fourteenth Amendments to the United States Constitution in either petitioner's Brief-In-Chief or Reply Brief in the New Mexico Supreme Court under any of the Points therein raised. The first mention of due process and equal protection appears in petitioner's Brief in Support of Motion of Rehearing in the New Mexico Supreme Court.

ARGUMENT

I.

Certiorari Will Not Issue to Review a Decision of a State Court of Last Resort on Constitutional Issues Presented for the First Time on Motion for Rehearing.

An unbroken line of decisions of this Court hold that certiorari will not issue to review a decision of the court of last resort of a state upon Federal constitutional questions that were not presented to the state court until motion for rehearing afer final opinion. Typical of these cases is the case of *American Surety Company v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298, (1912). The Court there said:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare Corkran Oil & Development Co. v. Arnaudet, 199 U.S. 182, 193, 50 L.Ed. 143, 149, 26 S.Ct. 41; Godchaux Co. v. Estopinal, 251 U.S. 179, 181, 64 L.Ed. 213, 214, 40 S.Ct. 116; Live Oak Water Users' Asso. v. Railroad Commission, 269 U.S. 354. 357, 70 L.Ed. 305, 308, 46 S.Ct. 149. This is not a case where, as in Saunders v. Shaw, 244 U.S. 317, 320, 61 L.Ed. 1163, 1165, 37 S.Ct. 638, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Compare Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 79, 74 L.Ed. 710, 715, 66 A.L.R. 1469, 50 S.Ct. 228. Nor is the federal claim based, as in Brinerhoff-Faris Trust &

Sav. Co. v. Hill, 281 U.S. 673, 678, 74 L.Ed. 1107, 1112, 50 S.Ct. 451, upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution. Compare Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320, 74 L.Ed. 870, 875, 50 S.Ct. 326."

The case at bar does not come within any of the exceptions to the settled rule. The Supreme Court of New Mexico denied the Motion for Rehearing which first raised the federal constitutional questions without opinion. The Decision of the District Court and the Decision of the Supreme Court were based upon the same construction and application of New Mexico law. If a federal constitutional question was to be relied upon, it should have been presented to the trial court, and in any event to the Supreme Court of New Mexico upon the appeal and not for the first time upon Motion for Rehearing. There was nothing in the Decision of the Supreme Court of New Mexico that could in any manner be said to have produced an unanticipated result.

II.

Appropriate Procedures Were Available to Petitioner to Disqualify the Trial Judge, and Petitioner's Failure to Properly and Timely Use Same, Cannot Be Considered a Denial of Due Process.

In the State of New Mexico, there are two types of disqualification, i.e., constitutional and statutory. If a litigant chooses to disqualify a Judge on a constitutional ground, it is necessary that a motion, objection, or other appropriate remedy be invoked calling the grounds of disqualification to the Court's attention and demanding a ruling thereon. *Gutierrez v. Middle Rio Grande Conservancy District*, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261, (1929); *Midwest Royalties v. Simmons*, 61 N.M. 399, 301 P.2d 334, (1956). A statutory disqualification is made by the filing of an Affidavit of Disqualification stating that the Judge before whom the matter is to be tried cannot preside over the same with impartiality, according to the belief of affiant, without any facts or grounds being

alleged, this method of disqualification being in the nature of a personal privilege.

The application to disqualify a Judge must be properly made. *In re Fox West Coast Theatres,* D.C. Cal., 25 F.Supp. 250, affirmed, C.C.A., 88 F.2d 212, (1937), certiorari denied, *Tally v. Fox Film Corporation,* 57 S.Ct. 944, 301 U.S. 710, 81 L.Ed. 1363, Rehearing denied, 58 S.Ct. 7, 302 U.S. 772, 82 L.Ed. 598, (1937). This is true in the State courts of New Mexico as well as elsewhere; an informal request is not sufficient. *Midwest Royalties v. Simmons,* supra.

The Western Union night letter sent on April 13, 1967, by petitioner to The Honorable Kermit E. Nash obviously could not be considered a proper application for disqualiffication. It apparently was based on alleged bias and prejudice rather than any constitutional grounds. It did not state that petitioner was disqualifying the said Judge, but rather requested the Judge to disqualify himself and to recuse himself from the matter.

It is to be noted that the said night letter from the petitioner further requested a postponement of the hearing set for May 2, 1967, and requested a return wire as to the Court's action on the said request as to postponement, as well as to disqualification.

That the disqualification of a Judge may be waived, especially where it is not based on constitutional grounds, is well supported by precedent. *State ex rel. Lebeck v. Chavez,* 45 N.M. 161, 113 P.2d 179, (1941); *State v. Garcia,* 47 N.M. 319, 142 P.2d 552, (1943); *United States v. Hethington,* C.A. Ill., 279 F. 2d 792, cert. den., 81 S.Ct. 271, 364 U.S. 908, 5 L.Ed. 224, (1960). In *State ex. rel. Lebeck v. Chavez,* the Supreme Court of New Mexico wrote:

> "We can see no distinction between the right to waive and the circumstances under which a party may waive such disqualification *before* having attempted to disqualify a judge, and the right to waive and the circumstances under which it may be done *after* the effort to disqualify. Our attention has not been called to any cases making

such a distinction, where the *right* to waive exists in the first place. We hold, therefore, that as to all causes of action set forth, petitioners have waived the question of disqualification, regardless of whether they had at first appropriately or irregularly attacked it."

After petitioner requested The Honorable Kermit E. Nash to recuse himself and to postpone the hearing, and did not obtain a favorable response to either request, petitioner finally on April 25, 1967, entered an appearance in the matter through New Mexico counsel, David L. Norvell, Esq., who then on April 27, 1967, filed petitioner's Affidavit of Disqualification, directed against all three Judges of the Fifth Judicial District, coverng three Counties. He followed this with a Motion for Continuance, mailed to opposing counsel on May 1, 1967, and obtained an Order from The Honorable Kermit E. Nash continuing the hearing to June 19, 1967. A further verbal continuance was also obtained by petitioner's counsel continuing the hearing to July 27, 1967.

The Supreme Court of New Mexico in its Opinion properly held that the action following the filing of the Affidavit of Disqualification effectively waived any right of disqualification claimed by petitioner. It is submitted that petitioner's request for a postponement by his night letter of April 13, 1967, would likewise constitute additional action, prior to the filing of the Affidavit of Disqualification, effectively waiving any right of disqualification.

In any event, having obtained the necessary continuances to prepare for the hearing, petitioner never again raised the matter of his attempted disqualification until the closing paragraphs of his Brief-In-Chief before the New Mexico Supreme Court. Compare *Rivera v. Hutchings*, 59 N.M. 337, 284 P.2d 222, (1955), on which petitioner relies, where counsel consistently through the trial and proceedings placed in the record his objection to the Court proceeding, obviously preserving the question for review, without waiver. If petitioner's counsel had desired to preserve any right of disqualification that he may have had, an application to the New Mexico Supreme Court for a Writ of Prohibition was also available, but was not used.

The Opinion of the New Mexico Supreme Court that any right of disqualification was effectively waived is undoubtedly correct. As to the assertions of lack of due process and equal protection under the Fifth and Fourteenth Amendments, made for the first time in petitioner's Motion for Rehearing before the New Mexico Supreme Court, petitioner's own failure to properly and timely use the procedural methods of disqualification available to him cannot be considered as a denial of due process and equal protection.

III.

The Refusal of the New Mexico District Court to Recognize Peck's Purported Will and the Pending Proceedings in the State of Texas Did Not Violate the Full Faith and Credit Clause.

In petitioner's appeal to the New Mexico Supreme Court, petitioner based his contention that the District Court erred in failing and refusing to honor and recognize the pending proceedings in Texas on the doctrine of comity, rather than the full faith and credit clause of the United States Constitution. In his Brief-In-Chief filed in the New Mexico Supreme Court, he states "A state court, in conformity to state policy, by comity, gives a remedy which the full faith and credit clause does not compel." It was not until his Motion for Rehearing was filed that he urged that the full faith and credit clause had been violated.

However, under neither the rule of comity nor the full faith and credit clause, was the District Court of Lea County required to recognize Peck's purported Will or the decree of the Dallas County Court admitting it to probate in that Court.

The Order of the County Court of Dallas County has been appealed from, and under the statutes of Texas (Vernon's Texas Rules Annotated—Civil Procedure, Vol. 3, Rule 335) is thus held in suspense. Since there is no finality, whatsoever, to the said Order of the Dallas County Court, it is not entitled to full faith and credit. In *Chapman v. John St. John Drilling Company*, 73 N.M. 261, 387 P.2d 454, 457, (1963), the Supreme Court of New Mexico stated:

"[4,5] It is not disputed that the award of the Texas Industrial Accident Board has been appealed in the manner provided by Texas law and that such appeal is now pending and undisposed of. We are thus confronted with the further question of whether the appeal denies the Texas award that finality requisite to invoke the full faith and credit clause. In an excellent annotation on 'Judgment as res judicata pending appeal or motion for a new trial, or during the time allowed therefor,' in 9 A.L.R.2d 984, 993, the general rule is announced that under the full faith and credit clause a foreign judgment is conclusive in another state only to the same extent it is conclusive in the state where it was rendered. It follows that a determination by the courts of Texas as to the finality of its judgment is controlling. It is well settled in Texas that 'an appeal from a judgment prevents its operation as res judicata.' Sabine Pilots Ass'n v. Lykes Brothers Steamship, Inc. (Tex. Civ. App. 1961) 346 S.W.2d 166, 169; Ray v. Hasley (5th Cir. 1954) 214 F.2d 366, 368."

Even assuming that the Order of the County Court of Dallas County was final, a New Mexico court would not be bound under any doctrine of comity to admit the Will in New Mexico, but would be entitled to re-examine the question of the jurisdiction of the Texas Court. This is a well recognized principle, and recognized by this Court. *Burbank v. Ernst*, 232 U.S. 162, 34 S.Ct. 299, (1914); *Holland v. Jackson*, 37 S.W.2d 726, (Supreme Court of Texas, 1931); *Barney v. Huff*, 326 S.W.2d 617, (Court of Civil Appeals of Texas, 1959); Page on Wills, 1941 Ed., Vol. 2, §726, p. 397. In *Burbank v. Ernst*, supra, wherein the Louisiana Courts had refused to recognize the probate of a Will in Texas on the ground that the testator died domiciled in Louisiana and thus the Texas Court had no jurisdiction, this Court upheld the Louisiana Court, and used the following language:

"Of course, the jurisdiction of the Texas Court depended upon the domicile of Burbank, which therefore was open to re-examination."

The Texas Courts also recognize that no jurisdiction exists

to admit a Will in Texas if the decedent was not domiciled in Texas and had no property therein on which the Will could operate. *Hardgrove v. De Tray,* 34 S.W.2d 379, (Court of Civil Appeals of Texas, 1931), affirmed, *De Tray v. Hardgrove,* 52 S.W.2d 239, (Commission on Appeals of Texas, Section A, 1932).

IV.

The Decision Below as to Peck's Domicile and Mental Capacity Is Based on a Proper Application of Precedents and Is Clearly Correct.

The whole of Peck's estate arises from the half section of land in Lea County, New Mexico, on which a Patent was finally issued in 1931. The reinstatement of Peck's homestead by the General Land Office was based on the fact that Peck became insane in 1912, *before* he left his homestead in New Mexico, as well as on the fact that he had made an entry, was an actual bona fide resident on the land up to the time of his insanity and had complied in good faith with the legal requirements up to the time of his becoming insane. Title 43, U.S.C.A., §172.

Since Peck was insane in 1912 before he left New Mexico, he is presumed to have been incapable of changing his domicile from the place it was when he became incompetent. *In re Collins' Estate,* 165 A. 285, 286, 11 N.J.Misc. 233, (1932); *Couyoumjian v. Anspach,* 103 N.W.2d 587, 594, 360 Mich. 371, (1960); *Sullivan v. Kenney,* 126 N.W. 349, 358, 148 Iowa 361, (1910); *Commonwealth v. Kernochan,* 106 S.E. 367, 129 Va. 405, (1921); *State v. Superior Court of Thurston County,* 255 P. 376, 143 Wash. 358, (1927); 96 A.L.R.2d 1236. Further, his incompetency is presumed to continue until otherwise shown. *Stanley v. Campbell,* 27 So.2d 411, 157 Fla. 891, (1946); *Belk v. Colleas,* 61 S.E.2d 464, 207 Ga. 328, (1950); *In re Peter's Estate,* 264 P.2d 1109, 1117, (1953); *Davis v. Davis,* 25 S.E.2d 181, 183, 223 N.C. 36, (1943); *Barrows v. Mutual Life Ins. Co. of New York,* 48 N.M. 206, 147 P.2d 362 (1944); *Bogel v. White,* 168 S.W.2d 309, (Court of Civil Appeals of Texas, 1942).

With these well recognized presumptions, the burden was

on petitioner to prove that somehow Peck had regained his mental capacity. This he was unable to do. His only witness, J. Mack Terrell, the owner and operator of the Rest Home where Peck spent his last three years, did not so testify. Petitioner never did explain how, after in 1963 having himself appointed as Peck's guardian in Dallas on an application supported by a doctor's affidavit that Peck was then of unsound mind, he can now contend that Peck had regained his mental capacity. As previously noted, the District Court in making its decision had the benefit of the testimony of two doctors, trained and experienced in psychiatry, one of whom was personally acquainted with Peck and had personal knowledge of his condition.

With there being no satisfactory proof that Peck had ever regained his mental capacity, the District Court was correct in finding that Peck's legal residency was still in New Mexico, where he was domiciled when he became insane, and with the whole of Peck's estate being located in New Mexico and petitioner refusing to bring the purported Will to New Mexico and offer it for probate, the District Court was fully entitled to proceed with determining heirship under the applicable New Mexico statutes in the proceedings in which said estate was being administered.

The petitioner in his Petition for Writ of Certiorari speaks of "plain fairness" and "simple justice," yet he seeks to gain the whole of his deceased uncle's estate, and to deprive his own brother and nephew of any share therein. What could be fairer and more just than to divide the Peck estate in equal shares among the three heirs-at-law, just as the District Court of Lea County did, and which the Supreme Court of New Mexico affirmed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MERRILL L. NORTON
and
A. M. SWARTHOUT

Counsel for Respondents

CERTIFICATE OF SERVICE

I, Merrill L. Norton, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 26 day of September, 1969, I served copies of the foregoing Brief For Respondents In Opposition on counsel for petitioner by mailing said copies in duly addressed envelopes, with first class postage prepaid, to petitioner's respective attorneys of record, as follows:

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Supreme Court of the United States

OCTOBER TERM 1969

No. 554

JOHN T. CHAMBERS,

Petitioner,

v.

W. M. BEAUCHAMP,
Administrator of the Estate of D. P. Peck, Deceased,
and Carl Andrew Chambers,

Respondents.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

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and
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Praetorian Building,
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Of Counsel:
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JOHN T. CHAMBERS, Petitioner herein, respectfully moves this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari entered on November 24, 1969, and (2) granting the Petition. As grounds for this Motion, Petitioner states the following:

Two other substantial grounds were available to Petitioner although not previously presented, to-wit:

I. Since the New Mexico--Clerk--Administrator relied upon Rule 335, Vernon's Annotated Texas Statutes as suspending the effect of the Order admitting Peck's Will to probate pending the appeal de novo in the Dallas District

Court, he should have been bound by the other provisions of the Texas Law on the subject, particularly Vernon's Annotated Statutes, Probate Code, Section 49, which provides that only the owners of the estate, or a part thereof, may institute and maintain an action to declare heirship.

II. The sending of Petitioner's telegram to the New Mexico District Judge, together with the subsequent Affidavit of Disqualification, timely and properly raised Petitioner's asserted right to a federally guaranteed fair trial.

BEAUCHAMP HAD NO CAPACITY TO SUE TO DETERMINE HEIRSHIP, MUCH LESS CONTEST PECK'S WILL.

Vernon's Annotated Texas Statutes, Probate Code, Section 49, reads in part as follows:

> "Section 49. WHO MAY INSTITUTE ACTION TO DECLARE HEIRSHIP.
>
> Such action may be instituted and maintained in any of the instances enumerated above by any person or persons claiming to be the owner of the whole or a part of the estate of such decedent . . . "

Beauchamp relied upon Texas Rule 335 to enable him to attack Peck's Will in the New Mexico proceeding. But he brought the proceeding initially as a suit to determine

heirship. Clearly, under Texas law, he had absolutely no capacity to bring the suit in the first instance. Petitioner has heretofore raised the question of Beauchamp's lack of capacity to contest the Peck Will. But the question presented here is different. If Beauchamp did not own or claim any portion of the Peck Estate (and he did not), then he had no capacity to even file the suit to determine heirship.

An Administrator, as such, simply is not a person interested in the estate contemplated by Texas law. Ari vs. Sanez, (Tex. Civ. App., 1932) 52 SW 2d 383.

Capacity or standing to sue is a vital ingredient. Witness the action of the Tenth Circuit Court of Appeals on August 11, 1969 in affirming the District Court's dismissal of the Plaintiff's suit in Velvel vs. Nixon, where Professor Lawrence R. Velvel of the University of Kansas Law School sued President Nixon and others for a declaratory judgment that the Vietnam military conflict is unconstitutional, absent a Congressional declaration of war. He simply had no standing to sue. Neither did Beauchamp.

PETITIONER'S TELEGRAM AND AFFIDAVIT AS TO DISQUALIFICATION ADEQUATELY AND IMMEDIATELY RAISED THE CONSTITUTIONAL QUESTIONS INVOLVED.

Petitioner has failed to present this point previously. It relates to substance rather than form. It relates to simple fairness. It relates to Petitioner's right to a federally

guaranteed fair trial. Petitioner's telegram to the New Mexico District Judge (Appendix "K," Page K-1, Petition for Writ of Certiorari) uses plain, simple and intelligible language to tell the Judge that by reason of his long association with his own Clerk and that by reason of the fact that said Clerk had committed illegal acts to the estate in question made it "impossible for you to be fair and impartial."

Petitioner submits that he falls squarely within the guidelines set forth by Mr. Justice Black in Holt vs. Commonwealth of Virginia, 85 S. Ct. 1375 (1965), 381 U.S. 131.

Petitioner submits that these foregoing substantial grounds further indicate the infringement of his constitutional rights by the State of New Mexico and its agents, specifically Judge Nash and Beauchamp.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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BY_____
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OF COUNSEL:

ODENEAL & ODENEAL

CERTIFICATE UNDER SUPREME COURT RULE 58

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Paragraph 2 of Rule 58.

_____
J. Redwine Patterson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above and foregoing Petition for Rehearing of Order on Petition for Writ of Certiorari have this day been served upon counsel for Respondents by depositing same in the United States mail, with sufficient postage affixed, addressed as follows:

Mr. Merrill L. Norton
Attorney at Law
Lovington, New Mexico

Messrs. Heidel, Swarthout and Samberson
Attorneys at Law
Lovington, New Mexico

Dallas, Texas this_____day of December, 1969.

_____
J. Redwine Patterson